UNITED STATES DEPARTMENT OF AGRICULTURE
Bureau of Agricultural Economics
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SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE of complaints filed under THE PERISHABLE AGRICULTURAL COMMODITIES ACT

No. 6 - NOT TO BE PUBLISHED - August 1, 1938

I N D E X

PACA SUMMARIES OF DECISIONS NOT BE PUBLISHED

S-801, Sept. 19, 1934, Docket 1009; (S.P.)

GRAND MESA FRUIT COMPANY, DELTA, COLO., vs. E. MEYER FRUIT CO. AND J. HYMAN BROKERAGE CO., OMAHA, NEBRASKA.

Violation charged: Failure to account.
Principal point involved: Inspection and acceptance precluded later rejection.
Order: Reparation awarded complainant against E. Meyer Fruit Co. in the sum of $218.45, with interest; case against J. Hyman Brokerage Co. dismissed. Facts ordered published.

Outline of Facts

Following an exchange of telegrams, J. Hyman Brokerage Co. received from complainant a carload of bulk Jonathan apples with instructions to sell the car at $1.80 per hundred pounds delivered, and after deducting brokerage to remit the balance promptly to complainant. The broker contacted the E. Meyer Fruit Co. who examined the carload of apples, purchased it at the agreed delivered price of $1.80 per hundred pounds, immediately commenced unloading it, and when the car was partly unloaded called for a Federal inspection on condition and complained to the J. Hyman Brokerage Co. that the lower, unseen half of the car was in very poor condition and for that reason the apples could not be taken as purchased, but would be handled on a commission basis. The record did not show that any warranty whatever concerning quality or condition was made by complainant or its broker, but the E. Meyer Fruit Co. purchased the apples after making a personal examination of them and although the Federal inspection made at Omaha showed that the bulk of the damaged apples was hidden in the lower portion of the car, yet enough damage was found on or near the surface of the load to have sufficiently warned a careful and prudent buyer to the extent that he would have made a thorough inspection before purchasing.

The E. Meyer Fruit Co. told the broker that they would handle the car on a commission basis and the broker transmitted this information to the complainant. However, complainant refused this offer and at no time gave its consent for any of respondents to handle the apples on a commission basis. After notice of respondents' objection to the quality of the apples, complainant made an effort to find other buyers but was prevented from so doing by a refusal on the part of E. Meyer Fruit Co. to allow prospective buyers to enter the car for inspection purposes. The E. Meyer Fruit Co. sold the car on a commission basis and remitted a check in the sum of $31.87 to the broker in full settlement for the car of apples. The broker thereupon advised complainant and applied that sum as part payment on a brokerage claim of $40 which it held against complainant. Complainant charged both respondents with failure to account.

The apples contained in the car weighed 29,400 pounds upon arrival at Omaha which at the agreed delivered price of $1.80 per hundred pounds were worth $529.20, less the freight charges of $274.88 and a charge of $4.00 for inspection, or $250.32, and after deducting the $31.87 paid by respondent to the broker as directed by complainant, there remained a balance of $218.45.

Rulings included in Decision

1. The record supported the allegation of the complaint and showed that E. Meyer Fruit Co. violated the Act. Reparation was awarded complainant against the E. Meyer Fruit Co. in the sum of $218.45, with interest.

2. J. Hyman Brokerage Co., fully accounted for all money received from respondent, E. Meyer Fruit Co., and was therefore not liable as charged by complainant for a failure to account under the Act. The case against J. Hyman Brokerage was therefore dismissed.

S-862, Nov. 13, 1934, Docket 1479: (S.P.)

HERBERT W. CLARK, INC., PENSACOLA, FLA. vs. S. T. RUNZO & CO., INC. CRESSON, PA.

Violation charged: Rejection.
Principal point involved: More weight given to shipping point inspection than at destination on f.o.b. sale.
Order: Reparation awarded complainant in the sum of $203.91, with interest, and facts ordered published.
Appeal: Judgment of non pros entered March 10, 1938.

Outline of Facts

Complainant and respondent entered into a written contract, through a broker for the sale and purchase of a carload of U.S. No. 1 Wakefield cabbage, good solid heads, medium, containing 284 crates at an invoice price of $229.72. The cabbage was originally shipped from Independence, Louisiana and on the date of sale diverted from Hammond, La. to respondent at Cresson, Pa. on an f.o.b. Hammond, La. basis. Federal inspection made at shipping point the day before the car was diverted from Hammond (or the day before the sale) showed that the cabbage was U.S. No. 1 and otherwise conformed to the specifications of the contract of sale. The respondent rejected the car upon arrival and complainant resold the cabbage for a net sum of $25.81. Respondent relied upon Federal inspection certificate dated May 13, 1934 at Philadelphia at 1:00 P.M., which was nine days after the cabbage was inspected and shipped from Independence and five days after it arrived at Cresson, which inspection showed that the cabbage "now fails to grade U.S. 1 only on account of decay".

Ruling included in Decision

Since this was an f.o.b. sale Hammond, La., greater weight should be given to the original inspection certificate. Complainant established by a fair preponderance of the evidence that the cabbage conformed to the terms of sale and respondent's rejection was without reasonable cause.

Appeal

Respondent filed an appeal in the U.S. District Court in December, 1934. Case was closed under rule #17 and judgment of non pros was entered without prejudice March 10, 1938.

S-1524, March 30, 1937, Docket 2478: (S. P.)

GROWERS EXCHANGE, INC., NORFOLK, VA. v. F. E. BALDWIN & CO., CHICAGO, ILL.

Violation charged: Unjustified rejection of four cars of potatoes, and failure to fully pay for the fifth car of the contract.

Principal points involved: Failure to divert on date specified and failure of goods to meet grade justified rejection; respondent liable for balance of purchase price of accepted car.

Order: Complainant awarded $119.70 with interest.

Outline of facts

On June 22, 1936, through a broker, complainant sold to respondent five carloads of U. S. No. 1 Cobbler potatoes at the agreed price of $3.70 per sack delivered Chicago, Ill. On the same date the broker issued a confirmation of sale specifying that the five carloads consisted of 300 sacks each and that the cars were then rolling "from Greenwich Yards 6-22-36." Immediately following respondent's purchase directions were given to the broker to divert three cars to Cincinnati, Ohio, and two cars to Detroit, Mich. Complainant diverted the five cars from Greenwich Yards, Philadelphia, at 8:10 p.m. June 23. Four of them went to Cincinnati, Ohio, but arrival thereof was 24 hours later than respondent had expected, based on the regular railroad schedule and the assumption that diversion would be made from Greenwich Yards, Philadelphia, June 22. The purchasers of the four cars refused to accept them on account of the delayed arrival and respondent in turn rejected them. The fifth car moved to Detroit over another route and arrived at that destination at 2:15 p.m. June 25. Respondent accepted and sold the potatoes in this car and remitted to complainant $831.80. Complainant sought an award for the loss sustained on the four rejected cars and for the balance of the purchase price of the car which was accepted.

Respondent maintained that complainant failed to make diversion upon the date specified and on account thereof respondent lost the sale of the four cars which went to Cincinnati, and that the fifth car arrived at Detroit 36 hours late and after talking with the representative of the broker "and telling him that we would take the car at $3.25 delivered at Cincinnati we went ahead and sold this car in Detroit and thereafter remitted $831.18."

Respondent showed by reference to Federal-State of North Carolina inspection of one of the four-car lot made at Moyock, N. C. June 18 that the load then failed to grade U. S. No. 1. Federal-State of North Carolina inspection of the potatoes in another of the four-car lot made at Grantsboro, N. C., June 18 showed that that lot also failed to grade U.S. No. 1.

Rulings included in decision

1. Respondent's rejection of the four carloads forwarded to Cincinnati was not without reasonable cause. Complainant contended that the five carloads were sold as "rollers" and that no definite time of diversion was specified and "absolutely none guaranteed." The sale contract, however, provided for Chicago delivery. Complainant undertook to deliver to respondent at Chicago five carloads of grade U. S. No. 1 Cobbler potatoes. The broker's use of the language "from Greenwich Yards June 22, 1936" indicates an intention that diversion would be made June 22, the date of purchase. There is nothing to indicate that a change of diversion from Chicago to Detroit and Cincinnati had any effect on complainant's undertaking to accomplish the diversion on June 22. It was also complainant's obligation under the contract of sale to deliver to respondent at Chicago five carloads of grade U. S. No. 1 potatoes represented as then being present in the cars described. The change of destination from Chicago to Detroit and Cincinnati did not affect complainant's representation that the five carloads were then grade U. S. No. 1 stock.

2. The car which was forwarded to Detroit was accepted and sold by respondent. This carload graded U. S. No. 1 at shipping point. While its arrival at Detroit was delayed, it did not clearly appear that there was any consent on complainant's part to reduce the price from $3.70 to $3.25 per sack. There remained due and owing on this car $119.70 and complainant was awarded that amount, plus interest.

S-1537, April 14, 1937, Docket 1778: (S. P.)

WEYL-ZUCKERMAN & CO., KANSAS CITY, MO. v. FOY BROKERAGE CO., BALTIMORE, MD.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal points involved: Rejection must be based on breach of express or implied warranty; alleged custom or usage of trade must be known to complainant or so notorious, universal and well-established that complainant's knowledge thereof can be conclusively presumed; lack of proof of resale commission charge; expense incident to qualifying a witness or settling a dispute not allowable as damages.
Order: Complainant awarded $162 with interest; publication of facts.
Appeal: Court decided in favor of respondent.

Outline of facts

On or about Feb. 28, 1934, through a broker, complainant sold to respondent one carload of potatoes, approximately 85% U. S. No. 1 quality, at the agreed price at $2.20 per cwt. delivered Baltimore, Md., a total of $792. The potatoes were shipped from Eaton, Colo., and tendered to respondent at Baltimore, but were rejected by respondent because of the appearance of the bags and then resold by complainant for a net amount of $162 less than the original contract price. Complainant asked for an award for that amount plus $63 representing the resale commission and $1 covering the cost of inspection certificate.

Respondent claimed the rejection was justified because the potatoes were shipped in old bags which had been turned inside out and that they showed wet spots and many potatoes were sprouted, and contended that the claim of complainant was barred because the action, if any, accrued on Feb. 28, 1934 and the complaint was not filed until Jan. 22, 1935. It appeared, however, that informal complaint was filed and action instituted by complainant Sept. 18, 1934, which was within the period allowed under the act for the filing of a claim for reparation.

Federal-State inspection certificate dated Feb. 28, 1934 covering the potatoes at shipping point certified them as "U. S. Commercial, Size A, 88% U. S. No. 1 quality." Federal inspection certificate dated March 7, 1934, Baltimore, Md., certified the potatoes as 85% U. S. No.1 quality, failing to grade U. S. No. 1 on account of defects in excess of tolerance, there being an average of 11% grade defects consisting generally of sun burn, cuts, second growth and bruises. In some sacks scattered in load there were 1 to 6 wet and flabby tubers, or tubers affected with slimy soft rot, following freezing injury, average not over 1%, and also an average of 3% showing sprouts.

Rulings included in decision

1. The potatoes conformed to the specifications of the contract. The destination inspection certificate showed they graded 85% U.S. No.1, and that the decay was within the tolerance allowed for the specified kind and grade.

2. Cognizance must be taken of the fact that the contract was silent with respect to the nature of the bags in which the potatoes were to be packed. Respondent's defense was based upon an implied covenant arising out of an alleged trade custom. The respondent, although disappointed in the general appearance of the sacks, could not rely upon the appearance of the containers in justification of refusal to accept the shipment, without first showing an express or implied covenant which had been breached by complainant. Respondent, in order to rely upon an alleged custom or usage of the trade, must show that the contract was entered into between the parties with the custom in view, and that the particular usage or custom of the trade was known by the complainant or it would not be binding unless the custom was so notorious, universal, and well established that the complainant's knowledge of the custom would be conclusively presumed. Trade usages should be invoked cautiously, lest they make the contract speak contrary to the general intention of the parties. Complainant submitted copies of Federal-State inspection certificates covering transactions with other parties, all of which indicated that the potatoes covered by said inspection certificates were shipped in recleaned sacks. While this is not conclusive, it was some evidence that there was no well-defined custom of the trade as contended by the respondent and adequately refuted any inference of such custom raised by the deposition of respondent's witness.

3. Respondent's rejection was without reasonable cause. However, complainant failed to submit evidence in support of the alleged resale commission charge of $63. Complainant further alleged it was damaged in the amount of $1 covering the cost of an inspection certificate issued at Baltimore. This expense was incurred in qualifying a witness to testify as to the condition of the commodity and in attempting to settle the dispute between the parties and could not properly be allowed as damage. Therefore, complainant's claim for damages was reduced $64, and it was awarded $162 with interest.

Appeal

On appeal filed by respondent, the U. S. District Court ruled that the terms of the contract had not been complied with and decided the case in favor of respondent. The court overruled complainant's motion for a new trial.

S-1559, June 25, 1937, Docket 2362: (S. P.)

K. LANE JOHNSON CO., YAKIMA, WASH. v. MOBRIDGE FRUIT CO., MOBRIDGE, S. DAK.

Violation charged: Failure to account and pay the full price for a carload of apples.
Principal points involved: Internal breakdown closely following arrival at destination was evidence of lack of suitable shipping condition; notice within a reasonable time as to condition of apples.
Order: Dismissed.

Outline of facts

On or about Feb. 22, 1936, respondent purchased from complainant one carload of Washington "C" grade apples at the agreed price of 50¢ per box f.o.b. Zillah, Wash. The apples were shipped from Zillah on Feb. 22, on which day the car was loaded from cold storage, and it moved to destination under carrier's protective service, arriving at Mobridge, S. Dak., on Feb. 29. It was unloaded by respondent the following day and the apples were placed in suitable storage rooms in which the temperature was thereafter maintained at about 35° to 40° F. It was discovered shortly after the apples were unloaded that the centers of a large number of them were soft and discolored. On March 10 approximately 200 boxes of the apples were found to

be "badly rotted and most of them entirely unfit for sale and use as food" and in their damaged condition were unmerchantable. The merchantable apples salvaged from the load were repacked and a portion thereof was transported as far as Minneapolis, Minn., in an effort to accomplish prompt resale. The prices received at that point ranged between 15¢ and 95¢ per box. Respondent therefore denied it was indebted to complainant.

Complainant contended that respondent waited four weeks before notifying complainant of the condition of the apples and that since the purchase was made f.o.b. shipping point damages due to excessive deterioration in transit should be secured from the carrier rather than from complainant, and asked for an award for $353.50.

Rulings included in decision

1. The evidence showed complainant breached its warranty that the apples at the time of the f.o.b. purchase thereof were in suitable shipping condition. The internal breakdown that followed so closely the arrival of the load at destination compelled the conclusion that the apples were not in suitable shipping condition at the time of purchase to withstand excessive deterioration during transit. Complainant suggested that the injury might have occurred in transit due to the maintaining of higher temperatures than usual in the transportation of cold storage apples but there was no evidence as to what temperatures were maintained in the car during transit. So far as the record disclosed there was nothing to show but what the shipment moved from loading point to destination "under normal transportation service and conditions."

2. Notice to complainant's traveling representative on or about March 26 as to the condition of the apples was notice made within a reasonable time.

3. The Uniform Sales Act which has been adopted in the States of Washington and South Dakota provides (section 69) that where there is a breach of warranty by the seller, the buyer may keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution and extinction of the price. It was concluded that the regulation above quoted became a condition of the contract. Respondent paid the transportation charges on the shipment at destination in the amount of $353.50, and the reasonable market value of the apples which respondent was able by resorting to salvage and sell to various purchasers was not in excess of the amount paid by respondent as transportation charges. The complaint was therefore dismissed.

S-1568, June 25, 1937, Docket 2157: (Hearing)

FINERMAN & RUBIN CO., INC., CHICAGO, ILL. v. I. FREEDMAN, INC., MODESTO, CALIF.

Violation charged: Failure to deliver 15 cars of grapes in accordance with contract specifications.
Principal points involved: Only nominal damages can be awarded when damages not proved; complainant liable for entire deficits when joint account contract silent as to deficits; no award to respondent since he did not request one.
Order: Complainant awarded $1.

Outline of Facts

On or about Sept. 4, 1935, respondent entered into a contract with complainant, who guaranteed an advance of $300 per car, for the shipment on joint account of 12 carloads of Zinfandel grapes and 8 carloads of Alicante grapes, net weight per lug 25 lbs., shipments to begin on or about Sept. 10, six carloads of Zinfandels and four carloads of Alicantes to be in lidded lugs and the remainder to be in unlidded lugs, the net proceeds over and above the guaranteed advance to be shared equally between the parties. Five carloads were shipped from loading point in California to Chicago, Ill., between Sept. 10 and Sept. 14, on which latter date shipments were temporarily discontinued at the request of Finerman & Rubin Co., Inc. Respondent failed, neglected and refused to deliver any or all of the remaining 15 cars on or after Sept. 24, the date on which resumption of shipments was requested, and advised the agent of Finerman & Rubin between Sept. 19 and Sept. 24 that owing to crop shortage and weather conditions no more than five cars of Zinfandels were available to fulfil the contract. Complainant claimed that by reason of such failure to make shipments, it suffered a loss and was damaged in the sum of $1449.95, being one-half of the proceeds which would have been realized from the sale of 15 cars if they had been shipped in accordance with the contract, after deducting $162.25 due respondent from the sale of the five carloads delivered. The sum retained by complainant was calculated as follows:

1/2 of profit on 4 cars . . .	$162.79
Less 1/2 deficit of $1.08 on fifth car	.54
Due respondent	$162.25

The testimony of several witnesses, including that of an investigator for the Department, was made a part of the record.

Rulings included in decision

1. Respondent breached the contract on Sept. 24, 1935 by failure to comply with the terms thereof.

2. Complainant failed to establish the amount of damages claimed with the degree of certainty required by law. Complainant attempted to prove damages by showing the prices in Chicago as of the dates when the 15

cars would have arrived. The bases of these alleged prices were the market news reports issued in Chicago but complainant failed to introduce these into the evidence. Complainant failed to show that it had a single purchaser for any of the 15 cars; that the prices quoted were for the same quality of grapes; or that all the cars would have actually been sold on the Chicago market. Complainant was therefore awarded nominal damages of $1.

3. The record showed the contract was silent as to the deficits, providing "guarantee advance, split profits over and above." Under the terms of the contract, the entire deficit was chargeable to complainant, and respondent was entitled to the sum of $162.79. However, the record showed that the respondent had not requested reparation in any sum, so no order was issued.

S-1569, June 26, 1937, Docket 2289: (S. P.)

THE S. LANDOW FRUIT & PRODUCE CO., INC., NEW HAVEN, CONN. v. JOHN L. SULLIVAN, MODESTO, CALIF.

Violation charged: Failure to deliver.
Principal points involved: Grapes moved under customary refrigeration; complainant failed to prove shortage in weight.
Order: Complaint dismissed.

Outline of Facts

On or about Oct. 7, 1935, through a broker, complainant purchased from respondent four carloads of U. S. No. 1 Carignane juice grapes, in lidded and labeled lugs, of approximately 25 pounds net weight each, at $27.50 per ton f.o.b. shipping point. The cars were shipped from Modesto, Calif., the dates of shipment and arrival dates being as shown below:

Shipped	October	10, 1935	Arrived at	New Haven	Oct. 21;
"	"	11	"	"	" 21;
"	"	12	"	"	" 23;
"	"	13	"	"Providence	" 24.

Complainant claimed some of the boxes were incorrectly and illegally marked as to weight and that respondent failed to give the railroad instructions for full ice protection and as a result the grapes were in a weakened condition and showed decay which resulted in heavy loss to complainant, to-wit: $44.30, $134.14, $99.81 and $84.33, respectively, or a total of $362.58.

Respondent claimed the contract of sale did not instruct the character of icing service and respondent therefore employed the customary method of refrigeration for juice grapes moving in October.

The four cars were inspected at point of shipment, Modesto, Calif., between the days of October 10 and October 13, 1935, which inspections disclosed that the grapes were of the Carignane variety and met the requirements of U. S. #1 juice grade and were being shipped in refrigerator cars with the hatch covers closed, plugs in, and bunkers full of ice, and that the mold and decay in the grapes was less than 1% and within grade tolerance. One car was inspected by the Binney Inspection Service, Inc., Oct. 26, 16 days after it was shipped, and five days after its arrival at point of destination, which inspection certificate showed that the ice bunkers on the date of inspection were one-half to three-fourths full of ice and that the temperature on the top was 45° and on the bottom 42°, and the temperature outdoors 64°. The inspection certificate on this car showed also that the actual weights of the lugs ranged from 21 to 30 pounds and averaged 26½ pounds gross weight, and that the decay and mold ranged mostly 5 to 7%, and therefore failed to grade U. S. #1 on the date of inspection.

Rulings included in decision

1. Respondent in shipping the four carloads of grapes employed the customary method of refrigeration for juice grapes moving in October, under what is known as Rule 254, under which service practically all shipments of juice grapes were being made at this time of year from that territory.

2. Complainant failed to prove by competent and sufficient evidence the shortage in weights as alleged in the complaint or that respondent was negligent. The grapes were weighed at an official weighing station at the point of shipment and invoiced to complainant on their actual weight. The complaint was therefore dismissed.

S-1570, June 25, 1937, Docket 2282: (S. P.)

BURNS AND BAY, OLATHE, COLO. v. FINERMAN & RUBIN CO., INC., CHICAGO, ILL.

Violation charged: Unjustified rejection of two carloads of onions.
Principal point involved: Federal inspection certificates outweigh those of private inspection service as evidence.
Order: Complainants awarded $201.23 with interest; publication of facts.
Appeal: After trial on appeal the U. S. District Court set aside the Secretary's award.

Outline of facts

On or about Jan. 3, 1936, through a broker, complainants, by contract in writing, sold to respondent one carload of U. S. No. 1 Colorado Spanish onions, 2 to 3 inches in diameter, at the agreed price of $1.15 per 50-lb. bag and one carload of U. S. No. 1 Idaho Spanish onions, 3 inches or larger, at the agreed price of $1.30 per 50-lb. bag delivered Chicago, Ill., or for a total contract price of $907.50. The onions were

shipped from loading points in the States of Idaho and Colorado to respondent at Chicago, one car containing 500 50-lb. bags of 2 to 3 inch Colorado Spanish onions and the other 600 50-lb. bags of Idaho Spanish onions 3 inches and larger, both cars being U. S. No. 1 and being of the size called for in the contract of sale. Upon arrival at Chicago, respondent refused to accept the shipments on the ground that the onions were damaged by frost. Complainants made resale for a net sum of $249.01 for the first car and $457.26 for the second, or a total of $706.27. Complainants asked for an award for the difference between the total contract price of $907.50 and the resale price of $706.27, or $201.23.

Respondent had one car inspected Jan. 9, 1936 by the Standard Inspection Service, Inc., and the other car inspected Jan. 11 by the same Inspection Service, whose inspection certificates stated that the floor layer bags in doorways showed the bottom layer of onions frozen.

At points of shipment the onions were inspected by a Federal-State inspector and they were also given Federal inspection upon arrival at Chicago, and these inspections failed to disclose any damage by frost. Complainants introduced in evidence the deposition of the company through which the carloads of onions were resold by complainants to the effect that the onions contained in these cars were free from frost damage when received and that they sold at average and better than average market quotation for U. S. No. 1 grade onions of their size and classification.

Rulings included in decision

1. The two carloads of onions, when tendered to respondent by complainants, were free from frost damage and were of the size and grade specified in the contract of purchase. The preponderance of the evidence failed to support the allegations contained in the respondent's answer that the said cars were frost damaged at the time they were tendered by complainants to respondent at Chicago.

2. Respondent's rejection of the onions was without reasonable cause and complainants were awarded $201.23, plus interest.

Appeal

Respondent filed an appeal with the U. S. District Court from the decision of the Secretary. At the trial respondent introduced the testimony of three inspectors that the onions in the bottom layer of the load showed freezing injury. Since the only opposing evidence was the Federal inspection certificate which did not mention freezing injury, the Court set aside the Secretary's award.

S-1588, June 30, 1937, Docket 2321: (S. P.)

L. GILLARDE CO., CHICAGO, ILL. v. R. PUSATERI & SON, BUFFALO, N. Y.

Violation charged: Unjustified rejection of a car of chicory.
Principal points involved: There was no meeting of minds essential to a contract; since respondent did not accept the car no reparation order could be issued.
Order: Complaint dismissed.

Outline of facts

Complainant claimed that on March 13, 1936, complainant sold to respondent one carload of chicory at $1.40 f.o.b. Chicago; that the car was inspected and accepted on track at Chicago on behalf of respondent by the broker who negotiated the sale; that the car was diverted from Chicago to Buffalo, N. Y., but upon arrival respondent failed to accept it and that complainant was damaged in the full invoice price of the car, $116.29.

Respondent denied purchasing or authorizing anyone to purchase this shipment from complainant; alleged that respondent's dealings were with the broker, not with the complainant; that the car was purchased with the dis-

tinct understanding it would grade U. S. No. 1 and that a Federal inspection at Buffalo showed it failed to make that grade. The broker insisted that he had a valid order from the respondent calling for the purchase of this car on the basis of his inspection and acceptance on track in Chicago. The broker stated that he told respondent that the car had graded U. S. 1 at shipping point but the present contract was not made on the basis of any particular grade. On the other hand, the respondent insisted that it did not authorize the broker to purchase this car on an inspection and acceptance, track Chicago, basis.

Rulings included in decision

1. The negotiations did not result in a valid and binding contract for the purchase of the car. The record in the case showed that negotiations were carried on for the purchase of this car between the respondent and the broker. It was not clear whether the respondent knew that the complainant owned the car and this would account for the fact that the respondent did not notify the complainant of the rejection until several days after the arrival of the car at Buffalo. A full consideration of all the facts in this case showed that the complainant failed to prove by a preponderance of the evidence that a contract was ever entered into providing for the inspection and acceptance on behalf of the respondent by the broker. It was the duty of the complainant to establish its case by a reasonable preponderance of the evidence. There was no doubt but that some negotiations were carried on relative to this car, but the proof indicated that there was not a valid and binding contract ever entered into between the parties. There was certainly not such a meeting of the minds as is necessary for the establishment of a bona fide agreement.

2. The car was abandoned to the railroad. Since respondent did not accept the car, a reparation order could not be issued against it for even the reasonable value of the car. The complaint was therefore dismissed.

S-1602, July 8, 1937, Docket 2328: (S. P.)

IDAHO PACKING CORPORATION, POCATELLO, IDAHO v. FISHER BROTHERS COMPANY, CLEVELAND, OHIO

Violation charged: Unjustified rejection of a carload of potatoes.

Principal points involved: Complainant making no objection to amended memorandum of sale was bound by its terms; respondent's rejection because potatoes were not in new sacks was justified.

Order: Complaint dismissed.

Outline of facts

On March 20, 1936, through a broker, complainant sold to respondent a car of U. S. No. 1, size A, Idaho Russet potatoes, good stock

reasonably clean, $2.05 per bag delivered. The car, containing potatoes in old sacks, was shipped from Idaho to respondent at Cleveland, Ohio, but was rejected by respondent. Complainant claimed the car was resold at a net of $354.50, or at a loss of $73.90, to which there was added $4 for Government inspection and $10 for reconditioning the car for shipment, making a total of $87.90 claimed as damages.

Respondent claimed that the potatoes were to be in new, regular 100-pound bags; that the memorandum of sale received by respondent so specified; and that the potatoes were rejected because they were in old, reclaimed sacks.

The record showed that the memorandum of sale attached to the complaint gave the specifications of the contract as follows: "One car U S one Size A Idaho Russets $2.05 bag del. regular pack 100# bags buyer specified good stock reasonably clean." The memorandum of sale attached to the answer of the respondent added the words: "new regular pack 100# bags." The broker certified that the copy of the memorandum of sale attached to the respondent's answer was the one given to respondent in connection with the purchase of this car.

Rulings included in decision

1. The contract entered into called for new 100-pound sacks. The telegrams exchanged between the complainant and the broker showed that on March 19, when the contract was actually entered into and the memorandum of sale written, the terms did not include new 100-pound bags. However, on March 20 the broker wired the complainant that the respondent was requiring that the confirmation read new 100-pound bags. The file did not disclose that the complainant objected to the amendment of the contract and the broker accordingly issued a new memorandum of sale. Since the broker was acting as agent for the complainant and notified the complainant of the change in specifications, it was the duty of the complainant to have notified the broker that he did not agree to the amendment of the contract. The failure of complainant to notify the broker and its action in permitting the car to be delivered with knowledge of the amendment ratified the action of the broker in amending the contract.

2. The inspection reports and other testimony clearly showed that some of the sacks in the car were not new, and the car, therefore, did not meet the terms of the contract.

3. Respondent was within its rights in refusing to accept delivery of the car.. The complaint was therefore dismissed.

S-1609, July 20, 1937, Docket 2212: (S. P.)

TRIWAY BROKERAGE CO., LTD., KANSAS CITY, MO. v. CENTRAL OHIO FRUIT CO. and/or J. DONALD DUTCHER, both of COLUMBUS, OHIO.

Violation charged: Failure to account.
Principal point involved: Original contract abrogated by second agreement entered into, preventing seller from collecting amount constituting reduction agreed upon.
Order: Complaint dismissed.

Outline of facts

On or about July 2, 1935, J. Donald Dutcher, a broker at Columbus, Ohio, made a sale for complainant to the Central Ohio Fruit Company of one carload, 360 bags, of U. S. No. 1, Size A, Russet Idaho potatoes at the agreed price of $1.65 per bag, delivered, to be shipped from Kansas City, Mo. Upon arrival of the shipment at Columbus, Ohio, on July 6 the Central Ohio Fruit Company refused to accept the potatoes unless an allowance of 25¢ per bag was granted. On July 9, Weyl Zuckerman & Co., who apparently acted throughout this transaction as agent for complainant, wired the broker that the draft had been reduced in the amount requested. The record indicated that Central Ohio Fruit Company thereupon accepted the potatoes at the reduced price and paid for them accordingly. Complainant sought recovery of $90, the difference between the contract purchase price and the sum for which the shipment was resold after having been rejected.

Ruling included in decision

The original contract of sale was abrogated by the second agreement providing for a reduction of 25¢ per bag in the purchase price and the complainant received payment at the reduced price. The complaint was therefore dismissed.

S-1622, July 27, 1937, Docket 2472: (S. P.)

RIO GRANDE PRODUCE CO., MONTE VISTA, COLO. v. LESTER BROS., NASHVILLE, TEN

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: Alleged purchaser not bound when no proof submitted that he had purchased the car or had knowledge of the shipment until it arrived.
Order: Complaint dismissed.

Outline of facts

Subsequent to the purchase by respondents of one car of potatoes from complainant on or about Sept. 5, 1936, the broker urged respondents

to buy another car of potatoes and sent to the complainant a telegram indicating that such purchase had been made. The second car was shipped by complainant from Colorado to Nashville, Tenn., but was rejected by respondents.

Respondents denied having purchased the second car, denied having received a memorandum of sale covering the purchase, and denied any knowledge of the car until there was received from the railroad company a notice of its arrival.

Ruling included in decision

Complainant failed to show that the broker was the agent of respondents with authority to purchase a car or that any valid and enforcible contract was entered into. No memorandum of sale covering this second car was offered in evidence, the only evidence offered by complainant in support of its contentions being the wire from the broker to the complainant ordering the car, a wire from complainant to the broker confirming the sale of the car and a copy of complainant's invoice of the car. In view of respondents' denial that a car was purchased and their statement that no memorandum of sale was ever received and that their first knowledge of the shipment of the car was a notice from the railroad that it had arrived, it was considered that the complainant failed to prove its case by a fair preponderance of the evidence.

S-1626, July 27, 1937, Docket 2090: (S. P.)

L. I. DAVIS BROKERAGE CO., AMARILLO, TEXAS v. SALINAS VALLEY VEGETABLE EXCHANGE, SALINAS, CALIF.

Violation charged: Failure to deliver two carloads of lettuce.
Principal points involved: Meaning of term "best"; there was no meeting of minds, hence no contract resulted.
Order: Complaint dismissed.

Outline of Facts

On May 13, 1933, respondents quoted complainant a price of $1.10 and 85¢ per crate on sizes 5's and 6's, respectively. Complainant answered: SATISFACTORY SHIP TODAY HALF EACH FIVES SIXES BEST ICEBERG * * *." The following day respondents wired notice of shipment. Respondents' invoice included a $30 charge for top ice and a sight draft was drawn on complainant for $312.75. Upon arrival of the car at Amarillo, Texas, complainant forwarded it to Chicago, Ill., where sale was made for a gross of $379.20. Freight charges, the cost of extra top ice at Chicago, cartage, unloading costs, and commissions exceeded the gross returns in the amount of $20.38.

On June 1, complainant requested from respondents a quotation of "lowest price best fives sixes shipment tomorrow or Saturday", apparently meaning Iceberg lettuce. Respondents answered quoting $1.10 per crate

for size 5's and 95¢ for size 6's. Complainant then ordered for prompt shipment 100 crates of size 6's "balance fives, heavy pack Iceberg." A car containing 300 crates was shipped and billed to complainant for $345, which amount included $30 for top ice. Upon arrival of the car at Amarillo complainant forwarded it to Dallas, Texas. Complainant claimed that because the lettuce was inferior to what the contract called for and did not conform to respondents' warranty it suffered loss and was damaged in the sum of $333.12 on the first car and $70.60 on the second car and asked for reparation award for the total damages claimed.

Respondents claimed the contracts called for the best Iceberg lettuce respondents were shipping at the time; complainant contended that the use of the terms "best Iceberg" and "best fives sixes" was understood by it to mean lettuce at least equal to the quality required by grade U. S. No. 1 stock.

Ruling included in decision

The usual and customary meaning of the word "best" is that the commodity so described is of the highest percentage of excellence. If by the use of the word "best" the parties meant the highest Federal grade of lettuce, then respondents were required to furnish grade U. S. Fancy stock. The evidence, however, rather convincingly indicated that complainant had in mind stock of a higher quality and condition than respondents had in mind. One of the essentials of a contract is the complete meeting of the minds of the contracting parties upon all essential details of the contract. Unless there is such a meeting of the minds, no contract results. That seemed to be what happened in the instant case. This difference of intentions would, of course, have been avoided if a more definite specification had been used, as for instance a specific Federal grade. The complaint was therefore dismissed.

S-1630, August 26, 1937, Docket 2281: (S. P.)

SATULOFF PRODUCE COMPANY, INC., BUFFALO, N. Y. v. L. GILLARDE CO., CHICAGO ILL.

Violation charged: Failure to deliver in accordance with contract.
Principal points involved: Sale was made by brand and not by grade; damages were not proved.
Order: Complaint dismissed.

Outline of Facts

On March 9, 1936, by written contract, complainant purchased from respondent a carload of Yuma, Arizona, lettuce "Big Mac" brand, 80 size, at the agreed price of $3 per crate f.o.b. Chicago. The lettuce was shipped from Chicago, Ill., to complainant at Buffalo, N. Y., and arrived on the morning of March 11. It was inspected at 9:50 a.m. on that date

by an inspector of the U. S. Department of Agriculture, whose certificate stated that the "grade defects of U. S. No. 1 grade are within the tolerance" and that "Stock now fails to grade U. S. No. 1 only account percentage decay noted." Complainant claimed it purchased U. S. No. 1 grade and asserted it suffered loss and was damaged in the sum of $576.20, based on the difference between what the lettuce would have been worth had it met the specifications of the contract and the market value thereof as actually delivered, predicating the loss suffered on the average market value of lettuce at Buffalo March 11, which was stated to be $3.125 per crate.

Ruling included in decision

The lettuce was sold by brand and not by grade. There was no warranty on the part of respondent as to grade and respondent shipped the brand and size of lettuce specified in the contract. The damages claimed by complainant were not proved by any competent evidence and were purely speculative. The complaint was therefore dismissed.

S-1639, August 26, 1937, Docket 2236: (Hearing)

CHARLES L. BODDEN, STOCKDALE, TEXAS v. AUGUST MALCHER, POTH, TEXAS, and/or RICHMAN AND SAMUELS, INC., NEW YORK, N. Y.

Violation charged: Failure truly and correctly to account for 129 cars of onions.

Principal points involved: Principal estopped by its knowledge of contracts made with growers by its agent, its dealings under such contracts and its control over acts of its agent to deny agency relationship; mistake is without effect when made by only one party and not induced by or known to other; rule of accord and satisfaction not applicable unless there is unliquidated sum and a bona fide dispute; principal liable to growers for deductions unauthorized and improper under agent's contracts with growers regardless of mistake.

Order: Complainant awarded $3,169.49, with interest.

Outline of Facts

Complainant, assignee of each of 12 growers, asked for an award of $3404.12 due the growers on 129 cars of onions shipped in 1934, accepted and billed to various destinations outside the State of Texas by August Malcher, and disposed of by Richman & Samuels, Inc., who, in rendering accounts sales to the growers, were alleged to have made improper and incorrect deductions from the gross sales prices for brokerage fees and commission charges, for fees for inspection service and for incorrect distribution of monies received from railroad claims.

Richman & Samuels, Inc., alleged that its dealings were with Malcher, that the onions were sold for Malcher's account and that it truly accounted

to Malcher. Malcher's answer also stated that Richman & Samuels, Inc., sold the onions for his account and truly and correctly accounted to him, and alleged that he in turn correctly accounted to the growers who accepted the payments in full settlement of their accounts.

The record showed that on October 14, 1933, the two respondents entered into a contract whereby Richman & Samuels, Inc., was to handle by purchase or on consignment 1000 acres of onions grown by or for Malcher. Account sales on each car was to be made to Malcher after such charges as freight, cartage, brokerage to other brokers, commissions and any other necessary expenses had been deducted and the net proceeds were to be paid to the grower or credited to the account of the grower. Malcher agreed to contract with the growers for the purchase or consignment of onions only upon forms of growers' contracts made a part of his contract with Richman & Samuels, Inc., and that as he made the contracts with the growers copies thereof would be promptly forwarded to Richman & Samuels, Inc. Three of the growers introduced in evidence their written contracts with Malcher. In the body of these contracts it was provided that "after such charges as freight, charges pertaining to such shipments, have been deducted" the net proceeds were to be paid to or credited to the account of the grower. Respondents claimed these contracts should have included the provision for deduction of "cartage, brokerage, commission paid to other brokers and any other charges pertaining to such shipments" and stated they were not aware of the mistake in the contracts until investigation of this complaint by the Department. Testimony of the parties as to the terms of the written contracts that were lost was in sharp conflict. Malcher testified that freight charges, cartage, commission to other brokers and other necessary expenses, including his brokerage of $25 per car, were to be paid by the growers. Five of the growers testified that they were to pay Malcher $25 per car as brokerage and nothing more, and that nothing was said by Malcher as to any other brokerage or commission charges. In substance, the testimony of these five was identical and compared favorably with the written contracts in evidence, in that the written contracts presented made provision for only one selling charge of $25.

Richman & Samuels, Inc., collected various claims against railroad companies and deducted 25% of the claim money as its collection fee. When the money was transmitted to Malcher, he deducted an additional 10% as his fee. The growers were unaware that damage claims were being filed and had not authorized either respondent to file them. Malcher charged the growers with inspection fees of $4 each on 11 cars which were not actually inspected or the $4 paid.

Rulings included in decision

1. Malcher was the agent of Richman & Samuels, Inc. They entered into a contract which tended to show Malcher as an independent contractor. However, as Malcher did not comply with the contract but did make other contracts with the growers and placed said contracts in the possession of Richman & Samuels, Inc., and, further, since the general agent for

Richman & Samuels, Inc., who occupied an office room adjoining Malcher, had ample opportunity to examine the contracts and was present when the grading, packing, and shipping was in progress, the latter was in a position to have refused any and all shipments not complying with the original contract. Richman & Samuels, Inc., accepted the onions and sold them or consigned them under the above-described circumstances and with knowledge or the means of knowledge at hand, and it was held that its dealings with the growers were such as would estop Richman & Samuels, Inc., from denying that Malcher was its agent. The facts in the case showed that Malcher was controlled by Richman & Samuels, Inc., and that he could perform and conduct business only upon specific instructions from it. Another significant fact was that Malcher was not under license to do business as a commission merchant or broker, although he was aware of the provisions of the act.

2. There was no testimony in the record bearing on the claim of Louis Pollock. Therefore the complaint with reference to the assigned interest of this grower was dismissed.

3. The contracts, written and oral, entered into with the growers were valid and enforcible. In a Minnesota case, the court held that a mistake is without effect where it was the mistake of only one party and was not induced by, or actually known to, the other. Richman & Samuels, Inc., failed to prove such a mistake as the law recognizes, and it was therefore held that the written contracts were in full force and effect. Respondents contended that the contract between them was in force and effect. Under that contract it was Malcher's duty promptly to forward to Richman & Samuels, Inc., a copy of each contract entered into with the growers. The purpose of a written contract is to furnish a record of the terms of the agreement of the parties and thereby avoid subsequent disputes or misunderstandings. The terms of a written contract are not easily impeached and there is cast upon the person alleging mistake a heavy burden to prove the mistake upon which he relies for modification or avoidance of the contract as written. To support such a contention the evidence must be clear and convincing. The rule is that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence, or oppression. If he has exhibited all the outward signs of agreement, the law will hold that he has agreed. As a rule a person cannot avoid his contract simply by showing that he has made a mistake. There are, however, exceptions to this general rule, as in the case of mutual mistake of both parties and of mistake of one party induced by, or known to, the other. In the instant case there could be no mutual mistake for the reason that the growers accepted the contracts at face value, and for the further reason that Richman & Samuels, Inc., had the contracts printed in accordance with a form furnished to the printer on the back of its letterhead, and further, because it then carried or made available to the complaining growers the said contracts for the growers to sign. Richman & Samuels, Inc., having prepared the written documents and presented them to the growers for their signature, was estopped to deny the contents thereof. The growers accepted the contracts in good faith and signed them as presented. The preponderance of the evidence was that Malcher agreed to handle the growers' onions for a fee of $25. This was in accordance with the written contracts printed by Richman & Samuels, Inc.

Furthermore, it was reasonable to suppose that the contracts with the growers in the same community would be identical in terms. The one exception was the case of Bruno Ulbricht. The preponderance of the evidence showed that Malcher & Ulbricht made an oral contract whereby Malcher purchased commercial grade onions at 50¢ per bu. and agreed to handle onions below commercial grade on a consignment basis, nothing being said as to handling charges.

4. The rule of law in accord and satisfaction is well settled that the release of the entire sum on payment of a part is without consideration, unless there is an unliquidated sum due and a bona fide dispute between the parties as to that sum. In this case, it may be said there was a liquidated sum due. This sum was the net proceeds of the sale after deduction of the charges authorized. There was certainly no bona fide dispute at the time the growers accepted and cashed these checks, because the growers were not in possession of the accounts sales such as would give them the opportunity of determining what amount was due. The doctrine of accord and satisfaction was not operative in this case.

5. Richman & Samuels, Inc., through its agent August Malcher, violated the provisions of section 2 of the Act in failing truly and correctly to account for the 129 cars of onions received by it. The commission and brokerage charges assessed by Richman & Samuels, Inc., with the exception of the account of Bruno Albricht, and the charging of the additional 10% for distribution of railway claims by Malcher and the charging by Malcher of inspection fees on cars which were not inspected were unauthorized and improper. An audit of respondents' records was prepared by the Department. This audit took into consideration all unauthorized and improper charges made by both respondents, and broke down the total amount to a prorate distributive share of the claims of the assignors. The usual commission charge of 10%, plus freight and other proper selling charges, was allowed, except that no second brokerage or commission charges were considered lawful where not specifically authorized. On this basis, complainant was awarded $3,169.49, plus int.

S-1643, Sept. 4, 1937, Docket 2497: (Hearing)

TWO BOYS FRUIT & PRODUCE CO., WAPATO, WASH. v. THE MALLIN PRODUCE CO., KANSAS CITY, MO.

Violation charged: Unjustified rejection of a carload of tomatoes.

Principal points involved: Exchange of telegrams and broker's memorandum of sale constituted compliance with Statute of Frauds; unsupported deposition of complainants insufficient proof that tomatoes shipped met grades specified.

Order: Dismissed.

Outline of Facts

Following an exchange of telegrams, on or about July 19, 1936 the broker issued a standard memorandum of sale describing the produce sold by complainants to respondent as 305 lugs U. S. No. 1 Bonnie Best tomatoes at $1.30 f.o.b. and 305 lugs of U. S. No. 2 Bonnie Best tomatoes at $1.05 f.o.b., straight pack, 6x6s and larger, good quality, pack, the total contract price being $716.75. The tomatoes had previously been shipped from Wapato, Washington, and were at that time in transit. They were thereafter diverted to respondent at Kansas City, Mo., where they arrived at 5:25 a.m. July 23 and respondent was notified of arrival about three hours later. Respondent rejected the car for the alleged reason that it was not of the quality purchased and it was thereafter sold for complainants' account resulting in the net sum of $185.23, which failed to equal the contract price by $531.52. Complainants asked for an award for the latter sum.

Rulings included in decision

1. The broker was clearly acting as the agent for both the complainants and respondent, and the exchange of telegrams, together with the memorandum of sale, constituted sufficient written memoranda to satisfy the Statute of Frauds. Furthermore, respondent never made objection to any of the provisions contained in the memorandum of sale, one of which was to the effect that unless objection was made immediately the contract should be construed as made in accordance with the authority given to the broker. Respondent's contention that the record failed to show compliance with the Statute of Frauds was therefore given no further consideration.

2. The complaint alleged and the broker's memorandum of sale clearly showed that the complainants sold U. S. No. 1 and U. S. No. 2 tomatoes. Complainants furnished no proof, other than the unsupported statement of one of the partners in his deposition, that such tomatoes were shipped. Under these conditions it was held that complainants failed to show they complied with the terms of the contract and for this reason the complaint was dismissed.

S-1644, Sept. 4, 1937, Docket 1989: (Hearing)

FLORIDA EAST COAST GROWERS ASSOCIATION, INC., MIAMI, FLA. v. T. MENDELSON CO., PITTSBURGH, PA.

Violation charged: Unjustified rejection of two carloads of tomatoes.
Principal point involved: In failing to prove the terms of the contract, complainant failed to show unjustified rejection.
Order: Dismissed.

Outline of Facts

Respondent's representative, while in Florida during March and April, 1935, made preliminary arrangements with complainant for the shipment of tomatoes during the 1935 season by complainant to respondent. Subsequently complainant shipped two carloads from Florida to respondent at

Pittsburgh, Pa., but they were rejected by respondent, who contended that the tomatoes were not up to contract requirements, and they were therefore resold by complainant at a loss of $1181.04, for which sum damages were asked by complainant.

Complainant contended that it sold tomatoes which were to grade U. S. No. 1 at shipping point; respondent contended that the agreement provided for an f.o.b. sale insofar as price only was concerned, and that it was definitely understood that the tomatoes were not purchased to be U. S. No. 1 either at shipping point or at destination but that they were to be superior to the average U. S. No. 1 tomatoes.

Ruling included in decision

The record contained no documentary evidence of any kind in support of complainant's contention that the tomatoes were to be U. S. No. 1 at shipping point and respondent testified at the hearing that no such contract was entered into. Complainant, in failing to prove the terms of the contract upon which it was claimed the tomatoes herein involved were sold, failed to show a rejection without reasonable cause by respondent. The complaint was therefore dismissed.

S-1660, Oct. 15, 1937, Docket 2609: (S. P.)

H. E. TAYLOR & CO., HOLYOKE, MASS. v. B. S. TRACY, MALONE, N. Y.

Violation charged: Failure to deliver a carload of potatoes in accordance with contract.
Principal points involved: Complainant failed to prove the samples examined which were unfit for human consumption were from this shipment or to prove loss; implied warranty that produce sold will be fit for human consumption.
Order: Dismissed.

Outline of facts

On or about Dec. 28, 1936, through a broker, complainant purchased from respondent for prompt shipment from Malone, N. Y., one carload of 360 sacks of U. S. No. 1, Size A, Green Mountain potatoes in new 100 lb. branded bags, at $2.40 per sack delivered at Holyoke, Mass. Upon arrival at Holyoke the shipment was accepted and the contract purchase price paid by complainant, who made no objection to the kind, quality or condition of the potatoes until about ten days later, when it was contended that complaints were received from those to whom he had resold at least a portion. Complainant claimed the potatoes were not fit for human consumption, and in support of this claim submitted a copy of a letter purported to have been written by a Research Professor at the Massachusetts State College, Amherst, Mass., on Jan. 20, 1937, stating that they had a peculiar and objectionable odor and flavor and were found unfit for consumption.

Shipping point inspection certificate dated Dec. 28 showed the potatoes graded U. S. No. 1, "Stock is mature, firm, fairly well formed and mostly fairly clean; many slightly dirty. Grade defects within tolerance. Less than 1% Soft Rot."

Ruling included in decision

Complainant failed to prove that respondent did not deliver good merchantable stock, complying with contract. There is an implied warranty in all sales of perishable agricultural produce that it will be fit for human consumption, since that is understood to be the purpose for which it is purchased, unless otherwise indicated, but the proof submitted by the complainant in this proceeding was so remote, disconnected and incomplete that it was impossible to find that he had been damaged by the respondent in any sum whatever. It was conceded that the sample of potatoes examined by the experts at the Massachusetts State College was unfit for human consumption, but the complainant submitted no connecting proof whatever other than his own sworn statement showing that the samples sent to these experts were taken from the shipment here under consideration. Moreover, complainant failed to prove that he sustained the claimed losses, in that he not only failed entirely to show to whom the alleged sales were made, but he neglected to secure depositions, as required under the act, from the purchasers in support of his allegations that the potatoes sold were from the particular car here under consideration. The complaint was therefore dismissed.

S-1661, Oct. 15, 1937, Docket 2611: (S. P.)

TRADER & HANCOCK, OAK HILL, VA. v. CRESSEY, DOCKHAM & CO., INC., SALEM, MASS.

Violation charged: Failure truly and correctly to account for a carload of potatoes.

Principal points involved: A sworn statement made by complainants approximately 8 months after shipment, purporting to cover inspection at loading point on or about July 11, could not be accepted as evidence of quality and condition at destination on or about July 20; respondent entitled to deduction for actual loss and labor in reconditioning; where goods fail to comply with contract specifications, buyer may reject or accept and recover damages.

Order: Dismissed.

Outline of facts

On or about July 14, 1936, through a broker, complainants sold to respondent one carload of U. S. No. 1 Cobbler potatoes, T & H brand, at the agreed price of $4.50 per bbl. delivered Salem, Mass. A car containing 191 bbls. was shipped from Lecato, Va., on or about July 11, and was diverted by complainants to respondent at Salem on or about July 14. It arrived at destination on or about July 20 and was rejected by respondent on that date.

Subsequent to the exchange of wires between the broker and complainants an offer of $3.25 per bbl. delivered was made by respondent, but rejected by complainants. In an ensuing telephone conversation the broker led respondent to believe that complainants had indicated a willingness to protect respondent against loss and labor due to deterioration in event the shipment was accepted. Respondent thereupon accepted and reconditioned the potatoes, and thereby sustained a loss of 7½ bbls., which at the agreed price of $4.50 per bbl. amounted to $33.75. To that amount was added the sum of $10 to cover the cost of labor in reconditioning. Consequently, in remitting, the respondent deducted the sum of $43.75, and this proceeding was brought to recover the sum deducted. Complainants maintained that by accepting the potatoes respondent "waived any defects that may have existed as to the grade or quality of said potatoes, and on accepting and unloading the said car, thereby agreed to pay the contract price."

Rulings included in decision

1. The potatoes, when tendered for delivery to respondent, did not conform to contract specifications. In delivered sales, it is the duty of the seller to tender to the buyer at destination specified goods meeting all quality and condition requirements of the grade specified in the contract. Presumably there was no official inspection made of the potatoes here under consideration at either the shipping point or at the destination. Complainants, in attempting to show compliance with the terms of the contract, submitted a sworn statement of one of the partners purporting to show that the potatoes were inspected by him and found to meet the requirements of U. S. Grade No. 1. This statement, which was subscribed and sworn to on March 5, 1937, or approximately eight months subsequent to the shipment of the potatoes, purporting to cover an inspection at loading point on or about July 11, could not be accepted as evidence of the quality and condition of the potatoes upon arrival at destination on or about July 20.

2. Respondent's deduction for actual loss and labor in reconditioning the potatoes should be allowed. Complainants' contention that respondent's acceptance amounted to an agreement to pay the contract price was untenable. It is a well settled principle of law that where goods fail to comply with contract terms the buyer may either reject them or accept and recover damages to cover loss through the seller's failure to make delivery in accordance with specifications of the contract, as recoupment in diminution or extinction of the price. Since the potatoes did not conform to contract terms and since respondent deducted only a sufficient sum to cover actual loss and labor in reconditioning, complainants' claim for damages was dismissed.

S-1671, Oct. 18, 1937, Docket 2418: (S. P.)

YAKIMA FRUIT GROWERS ASSOCIATION, INC., YAKIMA, WASH. v. GOLD HOFFMAN & POST, INC., MILWAUKEE, WIS.

Violation charged: Failure to account.
Principal point involved: The granting of an allowance by complainant abrogated the original and consummated a new contract, precluding claim for damages under original contract.
Order: Complaint dismissed.

Outline of facts

On or about June 8, 1936, through a broker, complainant sold to respondent one carload of Snokist Brand "C" grade Winesap apples, sizes 175 to 216, at the agreed price of 55¢ per box f.o.b. shipping point acceptance basis wired Federal inspection. Federal-State inspection was made on June 9 and the results wired to and approved by respondent on the same date. Thereafter, on or about June 12, 756 boxes of Snokist Brand "C" Grade Winesap apples covered by the Federal-State inspection were loaded at Gleed, Washington, and shipped to respondent at Milwaukee, Wis., where they arrived on or about June 19. A complaint was registered by respondent who claimed that the apples showed scald and, as a consequence, respondent requested an allowance of 10¢ per box, or $75.60 on the carload. Subsequent to an exchange of several telegrams by and between complainant and the broker, complainant reduced the draft in the amount of $75.60 and respondent thereafter accepted the shipment. Complainant asked for recovery of this allowance.

Ruling included in decision

The parties entered into what is considered the equivalent of a contract specifying "shipping point inspection final." It is well settled that the granting of an allowance constitutes an abrogation of the original and consummation of a new contract which operates to relieve the buyer from liability under the original contract. The seller in such cases can recover damages only on the basis of the new contract and is not entitled to the return of an allowance when such is granted with full knowledge of the facts and not under fraudulent misrepresentations. The granting of this allowance by the complainant was made with a full knowledge of all facts and not under any false misrepresentations on the part of respondent and therefore constituted an abrogation of the original and the consummation of a new contract which operated to preclude complainant from claiming damages under the terms of the original contract. The complaint was therefore dismissed.

S-1679, Oct. 28, 1937, Docket 2500: (S. P.)

REX D. MATHEWS & CO., TWIN FALLS, IDAHO v. HARLIN FRUIT CO., SPRINGFIELD, MO.

Violation charged: Unjustified rejection of a carload of apples.
Principal point involved: Complainant's failure to make shipment within the time specified justified rejection by respondent.
Order: Case dismissed.

Outline of facts

On or about Sept. 5, 1936, through a broker, complainant sold to respondent a carload of apples at $40 per ton f.o.b. Buhl, Idaho. They were shipped from Buhl to Springfield, Mo., but were rejected by respondent and complainant claimed they were resold on a delivered basis at Springfield for $52.50 per ton, resulting in damages of $37.52 after deducting freight and icing charges, and asked for an award in that amount.

Respondent, in its answer, stated that on Sept. 5 the broker offered the car of apples and was informed by respondent that they were not to be shipped later than Sept. 12, otherwise respondent would not buy them; that the broker wired complainant they were to be shipped as soon as possible but respondent knew nothing of this telegram until after a claim had been filed against respondent; that on Sept. 14 the broker was asked for the car number and the shipper telegraphed that the apples would be shipped on Sept. 15; that the broker was advised any further delay would cause respondent to refuse the car as the market was already declining; that without the knowledge or consent of the respondent the shipment was delayed until Sept. 17, at which time the market had declined to about $32.50 per ton; and that, had the shipment been made when specified by the respondent, a profit could have been made thereon.

A copy of respondent's answer was served on complainant, who was afforded an opportunity to file a sworn statement of facts in reply thereto. No further statement was submitted.

Ruling included in decision

The apples were not shipped within the time specified in the contract of purchase and sale and the rejection by respondent was not without reasonable cause. In the complaint it was admitted that the apples were sold on or about Sept. 5, and that they were not shipped until Sept. 17. It was not denied that the price of apples declined between Sept. 5 and Sept. 17. It was true that respondent did agree to extend the time of shipment until Sept. 15; however, respondent was not willing, due to the declining market, to have the apples shipped after Sept. 15. The complaint was therefore dismissed.

S-1682, Nov. 2, 1937, Docket 2219: (S. P.)

BOYD POTATO CO., DENVER, COLO. v. LANG & SLY, RAPID CITY, S. DAK.

Violation charged: Failure truly and correctly to account for a shipment of potatoes.
Principal point involved: Necessary that complainant show interstate character of the transaction.
Order: Complaint dismissed.

Outline of facts

On July 3, 1935, complainant sold to respondent 47 sacks of U. S. No. 1 white potatoes at $1.45 per cwt. f.o.b. Denver, Colo. Complainant claimed that the potatoes were inspected and accepted by respondent; that respondent gave complainant a check which was returned by the bank because of insufficient funds; and that complainant again offered the check to the bank and it was returned marked account closed. Complainant asked for an award of $71.52.

Respondent Sly, in a special appearance and answer alleged that the Secretary did not have jurisdiction of him since he has not been a member of respondent firm since July 1, 1935.

Ruling included in decision

It was necessary that complainant show that interstate commerce was involved in the sale before relief could be granted under the act. The complainant was given every opportunity to submit proof showing the interstate nature of this transaction, but failed to do so. The record contained no showing on this point and the claim was therefore dismissed.

S-1683, Nov. 2, 1937, Docket 2587: (S. P.)

W. J. ENGEL CO., CHICAGO, ILL. v. H. LESHINSKY & CO., MILWAUKEE, WIS.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: Respondent's rejection was not unjustified since the contract called for large potatoes and Federal inspection showed they were not large.
Order: Complaint dismissed.

Outline of facts

On or about June 11, 1936, complainant sold to respondent two carloads of potatoes to be shipped or diverted from Chicago, Ill., to Milwaukee, Wis., at $3.75 per cwt. delivered. They were so shipped or diverted and upon arrival respondent accepted one carload after an allowance was granted but rejected the other for the alleged reason that it purchased large potatoes and they were not average size. Complainant maintained they were

to be good average size and that they complied with the contract; that resale was made at $3.25 per cwt. and that damages of $150 were suffered, for which an award was asked.

Federal inspection certificate dated June 15, 1936 read, under "Size", "Generally ranging up to 12 ounces in weight, mostly 4 to 9 ounces with less than 5% under 1-7/8 inches in diameter."

Ruling included in decision

The potatoes did not conform to the contract of purchase and sale. The contract showed they were to be "large size" and the Federal inspection certificate, while restricted to one-third of the original load showed they were not large. Respondent's rejection therefore was not without reasonable cause and the complaint was dismissed.

S-1699, Nov. 6, 1937, Docket 1690: (S. P.)

SATULOFF PRODUCE CO., INC., BUFFALO, N. Y. v. VANN & CHASTAIN, CANAL POINT, FLA.

Violation charged: Failure to account for a deficit incurred in the handling of 183 hampers of green beans for respondents' account.
Principal point involved: Discovery of name of undisclosed principal as the seller subsequent to completion of contract made no difference in right of buyer to recover deficit from broker who made sale as seller and as such authorized handling on consignment.
Order: Complainant awarded $111.07 plus interest.

Outline of facts

On or about Nov. 23, 1933, through a broker, complainant purchased from respondents a carload of green beans, consisting of 398 hampers of Bountiful beans at $1 per hamper and 183 hampers of fancy Round Stringless beans at 70¢ per hamper f.o.b. The beans were shipped from Florida to complainant at Buffalo, N. Y. Complainant accepted the 398 hampers of Bountifuls and paid respondents the contract purchase price therefor, but objected to and refused to accept the 183 hampers of Stringless beans. On Nov. 27, the broker wired respondents: "ARRIVED HERE TODAY BOUNTIFULS OKAY SATULOFF COMPLAINING ROUND STRINGLESS CLAIMS LARGE OVERGROWN WILLING TAKE BOUNTIFULS INVOICE BUT INSISTING HANDLING ROUND STRINGLESS ALSO WANT YOU RELEASE CAR US SO CAN GET STARTED * * *," and respondents replied: "ANSWERING OK LET SATULOFF HANDLE CAR ALREADY BILLED DIRECT HIM WONT BE NECESSARY WIRE RELEASE TO RAILROAD ALSO REDUCING DRAFT FOR AMOUNT OF STRINGLESS TELL HIM PAY SAME PROMPTLY ALSO GET OUT RETURNS ON STRINGLESS." Complainant accepted the 183 hampers to be sold for the account of respondents, 114 of which were inspected and condemned because of being "rusty, decayed and anthracnose", as shown

by certificate of condemnation issued on Dec. 23 by the proper officials for the City of Buffalo. Complainant rendered accounting on Dec. 30, showing that the remaining 69 hampers were sold for the net sum of $44.33, which, when deducted from the cartage and freight paid by complainant, left a deficit of $111.07, for the recovery of which complainant asked for an award of damages.

A letter from respondents to the Department, dated May 21, 1934, in effect admitted the Stringless beans were handled by complainant at a loss of $111.07, but claimed that these beans were shipped by respondents for an undisclosed principal "who advises he is not able at this time to pay same and we do not feel like we should be forced to pay same."

Ruling included in decision

The previously-quoted telegrams, as well as the broker's Standard Memorandum of Sale which was also included in the record, indicated conclusively that respondents sold the beans as owners and as such authorized the complainant to handle the Stringless beans on consignment. The complainant, however, rendered its accounting and bill for the deficit to "Frank Friend--Vann and Chastain", indicating that at some time after the contractual relations between complainant and respondents had been completed, the complainant was in some way put on notice that Frank Friend had some interest in the beans. Such a discovery made by the complainant subsequent to the completion of the contractual relation between the parties, as clearly appears to have been the situation in the instant proceeding, could make no difference in the right of the complainant to recover from the respondents. Complainant was therefore awarded $111.07 plus interest.

S-1702, Nov. 6, 1937, Docket 2604: (S. P.)

CHESTER FRANZELL & CO., PITTSBURGH, PA. v. GEORGE B. BUCK, CARIBOU, MAINE

Violation charged: Failure truly and correctly to account on two carloads of potatoes; failure to deliver two carloads of potatoes in accordance with contract specifications.
Principal points involved: Fair and equitable compromise settlement accepted; cost of telegrams and inspections not allowed as part of damages; price paid for replacement cars not used as basis for damages when purchase made considerable time after unsatisfactory cars arrived and were rejected.
Order: Complainant awarded $76 with interest.

Outline of facts

On or about Sept. 21, 1936, respondent sold to complainant two carloads of potatoes, which were shipped from Caribou, Maine, to Pittsburgh, Pa., the contract being based upon telegrams. Respondent wired, on Sept. 22, to complainant, indicating he was accepting complainant's price of $1.90. At the same time complainant telegraphed that he would give $1.95 and then

again on the same date complainant wired that he understood respondent was accepting the offer of $1.90. Complainant claimed that under protest he paid the draft at $1.92½ per bag and that respondent overcharged complainant $18.25, for which amount reparation was sought.

On or about Oct. 31, complainant purchased from respondent two carloads of sound, unfrosted potatoes at $2.05 per cwt. The potatoes were shipped from Caribou to Pittsburgh. Complainant claimed that upon arrival they were found to contain unsound and frost damaged potatoes; that two cars of potatoes to replace them were purchased from a company at Greeley, Colo., at $2.42½ per bag, or a difference of 37½¢ per bag, and that complainant was therefore damaged in the sum of $285.

Respondent claimed both the last mentioned cars were inspected by a Federal inspector after arrival on Nov. 9 and found to contain "some wet breakdown or soft rot following scattered freezing injury, but an average of less than 1% of same, notwithstanding which said cars graded U.S. 1"; that because of the freezing injury respondent offered to reduce the draft $25 per car but complainant asked for an allowance of 10¢ per bag on each car, or $76, together with additional expense of $12 for telegrams, etc., and that there was no occasion for complainant's paying $2.42½ per bag for replacement potatoes.

Rulings included in decision

1. With reference to the first two cars, it appeared that, due to the telegrams being sent at approximately the same time, the complainant's offer was 5¢ per bag more than the price at which respondent agreed to sell the potatoes, and that each wanted to rely upon the price named by the other. Due to the misunderstanding, the respondent attempted to compromise the difference by making settlement on the basis of $1.92½, which the record indicated that the complainant accepted. It does not appear that there was any more reason why the respondent, the seller, should be bound by the higher offer of the complainant, the purchaser, than that the complainant should be bound by the lower offer of the respondent. Under the circumstances, settling for $1.92½ per hundred would appear to be fair and equitable.

2. The potatoes in the last two cars were to be "unfrosted" or free from frost, and while the potatoes in each car graded U. S. No. 1, they were not all free from frost. Respondent therefore did not deliver potatoes in accordance with the terms of the contract. Respondent stated in his answer that, although the market on November 9, 1936, for Green Mountain potatoes in sound condition was $2.15, 10¢ per bag, or $76, would be the maximum amount complainant could claim. Respondent, however, denied in his sworn statement of facts that complainant was entitled to any damages. Complainant claimed that he purchased potatoes from Greeley, Colorado, at $2.42½ per bag, or $285 more than the price he offered to pay respondent. The potatoes were alleged to have been purchased in Colorado a considerable time after November 9, which was on

or about the date the two cars shipped by respondent arrived in Pittsburgh, at a time when complainant, according to his own statement, could have obtained sound, unfrosted potatoes at $2.15 per hundred. Based upon admissions of the parties as to the market value of unfrosted potatoes, complainant was awarded $76 plus interest. Complainant also asked that the cost of telegrams sent in an attempt to get the matter adjusted and the cost of inspection certificates be included in the damages, but such expenses were not properly included in a reparation claim.

S-1717, Nov. 13, 1937, Docket 1857: (Hearing)

U.S. FRUIT SERVICE CO., CHICAGO, ILL. v. BROCKPORT COLD STORAGE CO., BROCKPORT, N. Y.

Violation charged: Failure to deliver apples in accordance with contract.
Order: Complaint dismissed.

It was believed unnecessary to discuss the controversy which let to the filing of this complaint or the issues raised by the parties since the differences were amicably settled at the hearing and a stipulation was entered into by the parties providing for dismissal of this proceeding.

S-1723, Nov. 16, 1937, Docket 2513: (S. P.)

COCHRANE BROKERAGE CO., INC., KANSAS CITY, MO. v. A. F. TAKAMINE CO., DENVER, COLO.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: Potatoes showing an average of 8% scald spots considered as not meeting the specification "sound arrival."
Order: Case dismissed.

Outline of facts

On June 8, 1936, by written contract, complainant sold to respondent a carload of potatoes to grade 85% U. S. No. 1 "sound arrival." The potatoes were shipped from Wasco, Calif., to respondent at Denver, Colo., and were rejected by respondent, who claimed they did not conform to contract specifications. Resale after rejection netted $874.75 and complainant asked for an award of $168, the difference between the net contract price and the net resale price.

The potatoes arrived at Denver on June 11, 1936, and were inspected on June 12 at 7:25 a.m. The inspection certificate showed that they were approximately 85% U. S. No. 1 and contained scald spots which averaged approximately 8%, ranging in many sacks from 4 to 30%, with less than 1% decay. They were reinspected on June 15, at 7:50 a.m. by two Federal inspectors, who issued an inspection certificate which showed that approximately 12% of the potatoes showed scald spot and less than 1% soft slimy decay.

Rulings included in decision

The potatoes did not conform to the specifications of the contract of sale and respondent's rejection was not without reasonable cause. The evidence submitted on behalf of each of the parties, other than the inspection certificates, as to the condition of the potatoes was very conflicting and in this case was entitled to little weight, for the reason that there were two Federal inspections. The potatoes were to grade 85% U. S. No. 1, and they were found to meet the requirements of this grade, but in addition thereto were to be "sound arrival," as set out in the confirmation of sale. If the parties had only specified that the potatoes should grade 85% U. S. No. 1, the contract would have been complied with, but the contract went further and provided for sound arrival. As the first inspection showed that they contained an approximate average of 8% scald spots and the second inspection showed 12%, it could not be said that they were sound on arrival. The case was therefore dismissed.

In an order denying complainant's application for reconsideration, the Secretary stated that while it is true that scald spots are grade defects, potatoes so affected are also unsound. It is often impossible to detect this defect at shipping point because it has not developed sufficiently by that time to become apparent. It will develop in transit, however, or after arrival at destination. Potatoes which are affected by soft breakdown, such as is characteristic of scald, cannot be considered sound, for such deterioration is progressive and is commonly followed by decay.

S-1724, Nov. 16, 1937, Docket 2448: (S. P.)

ALBION PRODUCE CO., INC., ALBION, N. Y. v. THE FINKE & SCHWIER CO., CINCINNATI, OHIO

Violation charged: Unjustified rejection of a carload of cabbage.
Principal point involved: Respondent not liable when no meeting of minds in negotiations for sale.
Order: Complaint dismissed.

Outline of facts

On Jan. 6, 1936, respondent wired complainant: QUOTE US PRICE CAR MEDIUM GREEN CABBAGE FIFTY POUND BAGS ANSWER POSTAL. On the same date complainant replied: CAR NICE QUALITY COLOR TWO TO FIVE DANISH FIFTIES EIGHTEEN FIFTY TON FOB. The next day respondent replied: WIRE RECEIVED AFTER CLOSING HOURS YESTERDAY IF CAR QUALITY AS STATED CAN USE SEVENTEEN. On the same day complainant wired: SUBJECT CONFIRMATION EIGHTEEN VERY LOWEST THIS STOREHOUSE QUALITY, and respondent replied: SHIP CAR CABBAGE EIGHTEEN IF QUALITY FANCY AS STATED. The car of cabbage was shipped from Ashwood, N. Y., to Cincinnati, Ohio, but was rejected by respondent. Complainant claimed that resale netted $129.01, and that on account of respondent's rejection complainant suffered damages represented by the difference between the contract price and the net resale price, or $86.99.

Respondent claimed to have purchased a car of medium green cabbage and that it was not medium green, as shown by the Government inspection certificate referred to in the complaint.

Complainant filed a sworn statement of facts in which it was stated that complainant did not contend that the cabbage "would meet green color requirements" and that the cabbage graded U. S. No. 1.

Ruling included in decision

There was no meeting of the minds on a material point and therefore no contract of sale. The respondent, as indicated by the first telegram quoted, wanted green cabbage. Complainant specified "storehouse quality." The respondent in reply referred to "quality fancy." The complaint was therefore dismissed.

S-1730, Nov. 17, 1937, Docket 2638: (S. P.)

B. NELSON & CO., INC., PHILADELPHIA, PA. v. DUCKWALL BROS., INC., HOOD RIVER, ORE.

Violation charged: Failure to ship a carload of pears conforming to contract specifications.
Principal points involved: Pears generally firm, few hard, do not meet specification generally hard, few firm; market price on Jan. 27 not a proper basis for damages as pears not sold until Jan. 30; damages claimed considered speculative.
Order: Complaint dismissed.

Outline of facts

On or about Jan. 17, 1936, through a broker, by contract in writing, complainant purchased from respondent a carload of pears which were to be generally hard, few firm, at $1.40 per box f.o.b. Hood River, Oregon. The pears were shipped to Philadelphia, Pa., where they arrived at 4:30 a.m. Jan. 28, and were unloaded and accepted by complainant, who paid the full purchase price without protest. Complainant claimed the pears did not meet contract specifications and that the failure of respondent to make shipment in conformity with contract resulted in damages of $322.50, claimed to be the difference between what the pears would have been worth had they complied with the contract and the market value as actually delivered.

Respondent attributed the damages to the fact that a substantial number of the pears, 279 boxes, were frozen in transit. Respondent filed a sworn statement stating that the frosted pears sold for a difference of 30 to 50 cents a box, indicating that the freezing injury was severe enough to have damaged the entire contents of the car and not only the 279 boxes. Respondent says that the pears that were sold for an average of $2.56, upon which price the complainant based its claim for damages on pears that were not frosted, were sold under date of Jan. 27, 1936, but that the pears in question did not arrive at Philadelphia until 4:30 a.m., Jan. 28. Further-

more, the pears that were sold for an average of $2.56 per box on Jan. 27 originated in the Rogue River district of Oregon, and not in the Hood River district, and that pears shipped from the former district during the 1935-1936 season were recognized as superior to those in the latter. The respondent also called attention to the difference in sizes of the pears sold on Jan. 27 and said that complainant's basis for damages was not a proper method of arriving at the actual damages.

Rulings included in decision

1. The pears did not conform to specifications of the contract of sale. The contract called for a carload of pears which were generally hard, few firm, and the respondent was verbally advised that they were generally hard, few firm. However, when the inspector analyzed his notes in order to prepare a certificate, he found that they were generally firm, few hard.

2. The basis of damages claimed by complainant was speculative. 441 boxes of pears were sold by complainant on Jan. 30 and 279 boxes, which were frosted, were sold by complainant on Feb. 3. Complainant based its claim for damages on the alleged market price of pears on Jan. 27. The pears sold on that date were from another district and of different sizes from those shipped by respondent. The complaint was therefore dismissed.

S-1735, Nov. 22, 1937, Docket 2548: (S. P.)

LERNER FRUIT & PRODUCE CO., ST. LOUIS, MO. v.
ABE GOLDBERG, INC., YOUNGSTOWN, OHIO.

Violation charged: Unjustified rejection of a carload of grapes.
Principal point involved: If term "finest quality" meant finest quality Tokays, it could only mean U. S. Fancy grade.
Order: Complaint dismissed.

Outline of facts

On or about Oct. 3, 1936, complainant and respondent exchanged a series of telegrams wherein complainant offered to sell, and the respondent agreed to purchase, a carload of grapes described by complainant as finest quality Gerrards American Beauty Tokays. Pursuant to the exchange of telegrams, complainant, on or about Oct. 4, 1936, diverted a car shipped from California, and then in transit, to respondent at Youngstown, O. Upon arrival at Youngstown on or about Oct. 7, it was rejected by respondent on the ground that the grapes did not conform to specifications of the contract. Complainant claimed that "finest quality" did not mean more than U. S. One. Respondent, however, claimed that it did not contract for U. S. One quality grapes, but for a higher grade.

Ruling included in decision

The term "finest quality" is somewhat indefinite; if it is interpreted as meaning finest quality Tokays, it could only mean in terms of the U. S. Standards, U. S. Fancy Grade, and the complainant's proof established the fact that the grapes under consideration graded U. S. One, rather than U. S. Fancy. If "finest quality Gerrard American Beauty Tokays" is interpreted to mean the finest quality that S. A. Gerrard Company were handling, complainant failed to offer any proof that the grade shipped was the finest quality being handled by Gerrard. Disregarding the difference of opinion as to the meaning of the term "finest quality" as used in the contract, and accepting complainant's interpretation thereof, complainant failed to establish the fact that the grapes offered for delivery were the finest quality being shipped by S. A. Gerrard Company, and therefore failed to prove delivery of grapes conforming to contract requirements. The complaint was therefore dismissed.

S-1741, Nov. 22, 1937, Docket 2415: (S. P.)

BIG 7 FRUIT WAREHOUSES, INC., YAKIMA, WASH. v. E. S. SMALL, YAKIMA, WASH.

Violation charged: Failure to deliver three carloads of apples in accordance with contract.
Principal point involved: By failing to give shipping instructions at proper time the buyer breached the contract and thereby released the seller from any duty to deliver.
Order: Complaint dismissed.

Outline of facts

On or about Oct. 15, 1935, respondent sold to Max N. Smith Company three carloads of Extra Fancy Winesap apples, 756 boxes to the carload, at 80¢ per box f.o.b. Yakima, Washington, the contract providing that they were to be shipped one carload in November, 1935, one on Jan. 2, 1936, and one on Jan. 14, 1936, the buyer to furnish shipping instructions as to destination later. The buyer failed to furnish instructions for the dates specified in the contract, the only instructions given being one shipping order dated Jan. 4, 1936, for shipment Jan. 8, 1936, and the shipping order for two cars dated Feb. 8, 1936, for shipment not later than Feb. 10. The seller admitted delivery was never made.

Max N. Smith, doing business as Max N. Smith Company of Yakima, Wash., by instrument dated March 6, 1936, assigned his rights under the contract to complainant, and complainant then filed the complaint in this case for damages in the sum of $500, the alleged difference between the contract price and the amount paid to replace the apples which were not delivered.

Respondent, in his answer and sworn statement of facts, alleged and claimed that he made an offer to deliver to Max N. Smith on Nov. 20, 1935, in the presence of witnesses, cold storage extra fancy defrosted Winesaps,

with certificate showing that the shipment met the Standard United States Export Requirement; however, complainant in its reply denied that any such offer was made and neither party submitted further proof to substantiate his claim regarding this fact.

Ruling included in decision

Complainant failed to establish by proper and sufficient proof that respondent failed, without reasonable cause, to deliver the three carloads of apples, and complainant's assignor, by failing to furnish shipping instructions prior to the dates specified in the contract, breached the contract and thereby released the seller from any duty to deliver. The shipping orders attached to the complaint and made a part thereof and the complainant's sworn statement of fact established the fact that the buyer did not issue instructions prior to and for the dates provided for delivery in the contract, but instead issued them for one car on Jan. 4, 1936 to be shipped on Jan. 8, and for the two remaining cars on Feb. 8, to be shipped not later than Feb. 10. Several court decisions were cited in this decision of the Secretary in support of the position that complainant breached the contract through failing to give shipping instructions at the proper time. Complainant also failed to submit sufficient proof to establish the Yakima, Wash. market price in November, 1935, on Jan. 2, 1936 and on Jan. 14, 1936, the dates specified by the contract for delivery. In reference to damages, it was established by copies of invoices and inspection certificates that the complainant's assignor bought three carloads of apples of the grade and type specified in the contract as follows: 700 boxes on Jan. 23, 1936, from a company in Yakima, at $1.05 per box, and 1625 boxes from another company in Yakima, on Feb. 8, at $1 per box. However, there was no proof submitted as to the local market price on the dates specified in the contract. Complainant, therefore, failed to prove the extent to which it was damaged. The complaint was dismissed.

S-1742. Nov. 22, 1937, Docket 2489: (S. P.)

GEORGE A. CHRISTY & SON, CRISFIELD, MD. v. T. MENDELSON CO., INC., PITTSBURGH, PA.

Violation charged: Unjustified rejection of a carload of tomatoes.

Principal point involved: That tomatoes did not meet specifications as to pack and maturity was shown by certificates of federal inspection at shipping point and at destination.

Order: Complaint dismissed.

Outline of facts

On or about Aug. 22, 1936, through a broker, complainant sold to respondent, on a delivered basis, one carload of tomatoes, to be shipped /that day from loading point in Maryland, to Pittsburgh, Pa. The specifications

as shown in the memorandum of sale called for "mature green stock. Good straight pack in lugs. Clean, good quality from new fields." Upon arrival at Pittsburgh on or about Aug. 24, respondent complained that the tomatoes did not conform to specifications of the sale and they were rejected.

A copy of the Federal-State of Maryland inspection certificate attached to the formal complaint, with respect to pack, showed "* * * 6x7 double wrapped, remainder standard pack, also many packed as extra row pack", and a copy of the Federal destination inspection certificate, with respect to condition, showed "* * * Of stock free from decay approximately 65% mature green, 20% turning, 15% ripe of which less than 1% is soft ripe.**"

Ruling included in decision

Complainant failed to establish that he offered for delivery tomatoes which met contract requirements. He attached the broker's memorandum of sale as an exhibit to the formal complaint and this document was therefore considered as evidence of what the complainant contended was in the contract. In its answer to the formal complaint, respondent raised the point that the evidence offered by complainant showed that complainant did not deliver tomatoes conforming to contract specifications with respect to pack and condition. Since this was obviously so, it was held that complainant failed to make good delivery and that respondent's rejection was not without reasonable cause. Shipping point inspection showed that this was not a car of straight pack tomatoes and destination inspection showed that it was not a car of mature green stock at destination. The complaint was therefore dismissed.

S-1745, Nov. 22, 1937, Docket 2512: (S. P.)

J.C. SEWELL PRODUCE CO., NAMPA, IDAHO v. AMATO FRUIT & PRODUCE CO., DENVER, COLO.

Violation charged: Unjustified rejection of a carload of grapes.

Principal points involved: Buyer of fresh grapes not entitled to receive full baskets at destination in delivered sale; Secretary may take judicial notice of fact that fresh grapes shrink appreciably in transit; average of 15% crushed and split grapes at destination indicates grapes did not meet contract specifications.

Order: Complaint dismissed.

Outline of facts

On or about Sept. 9, 1936, through a broker, complainant sold to respondent, for prompt shipment, one carload, of 864 baskets of U. S. No. 1 Table Concord grapes, in half-bushel baskets, at $1 per basket delivered Denver, Colo., which, after making an allowance for freight of $273, left a net price of $591. On Sept. 11, complainant shipped the grapes from Homedale, Idaho, and on Sept. 12 diverted the shipment to respondent at Denver, Colo., where it arrived Sept. 14 and was rejected by respondent. Following the rejection respondent made resale for a net re-

sale price of $280.65 and asked for damages of $310.35, the difference between the contract price and the net resale price.

Respondent stated that the baskets of grapes were slack, being filled to within 1-1/2 to 2 inches from the edges of the baskets and that, furthermore, the grapes did not come within the standard of U.S. No. 1 table grade. Respondent contended that, having specified the type of container in which shipment was to be made, trade custom required delivery by complainant at destination of a full pack.

Shipping point inspection certificate showed that the grapes fully met the requirements of U. S. Table grade on Sept. 11, at the time of shipment, and that the baskets were "well-filled - level", and the Federal inspection certificate secured at destination on Sept. 16 at 10:30 a.m., restricted to the top half of the load, showed all baskets slack, with baskets filled to within 1-1/2 to 2 inches from the edge of the basket, and that the grapes contained from 10 to 20% averaging approximately 15% of crushed and split berries, an average of approximately 2% Gray Mold decay generally following split and crushed berries, and an average of 2% of dried berries, in consequence of which the grapes did not then grade U. S. No. 1 Table grade.

Depositions taken in accordance with authority granted by the Department were considered but were not discussed in detail in view of the fact that the decision in this case would have to be based on the question: Did the grapes conform to the specifications of the contract of sale?

Rulings included in decision

1. Respondent's position with respect to the trade custom regarding pack, as to which respondent offered insufficient proof, was not tenable, since it is of such general knowledge as to be notorious that fresh grapes will shrink appreciably in transit, and the Secretary may take judicial notice of that fact. Respondent having failed to include a requirement as to pack in the contract contemplating a shipment of three days from an Idaho shipping point to Denver, and the baskets having been well filled at the time of shipment, his contention that he was entitled to receive full baskets at destination was without merit.

2. The grapes tendered by complainant to respondent at Denver did not conform to the specifications of the contract of sale. The shipping point inspection certificate showed that they fully met the requirements of U. S. No. 1 Table grade on Sept. 11, at the time of shipment. However, since the sale in this instance was made on a delivered basis, respondent was entitled to require delivery of grapes fully meeting the requirements of U. S. No. 1 Table grade on arrival at Denver. Respondent secured an inspection at destination by a Federal inspector some fifty hours after arrival of the shipment, which indicated that the grapes did not meet the requirements of U. S. No. 1 Table grade on arrival. Although Gray Mold decay may have developed

to some extent during the 50-hour period prior to the time of inspection, it was considered improbable that there was any appreciable development of split, crushed or dried berries following arrival of the car at Denver.

3. Since the shipment failed to meet the specifications of the contract on arrival at Denver, respondent's rejection was not without unreasonable cause and the complaint was therefore dismissed.

S-1759, Dec. 18, 1937, Docket 2405: (S. P.)

JOHN DEMARTINI CO., INC., SAN FRANCISCO, CALIF. v. SCOTT & GERACI, CINCINNATI, OHIO.

Violation charged: Unjustified rejection of a carload of asparagus.

Principal points involved: Federal inspection certificate outweighs other evidence as to quality, grade and condition; asparagus showing an abnormal amount of decay and wilt and an unusual amount of spreading heads considered not to have been in suitable shipping condition.

Order: Complaint dismissed.

Outline of facts

On or about April 15, 1936, complainant sold to respondents one carload of asparagus which was shipped from Valdez, Calif., on April 13 and diverted to them at Cincinnati, Ohio, on April 15. The contract specified "492 RIVERLAD BRAND FANCY LOOSE WHICH EQUIVALENT IN SIZE TO THAT PACKED EXTRA FANCY AND FANCY BUNCHED FEW LARGER STOP ALSO CONTAINS 44 FANCY BUNCHED 24 EXTRA FANCY BUNCHED RIVERMAID BRAND STOP THIS ASPARAGUS IS CLEAN AND PRACTICALLY FULL GREEN OFFER SUBJECT CONFIRMATION FOB SHIPPING POINT LOOSE 1.50 BUNCHED EXTRA FANCY 1.85 FANCY 1.75 PRECOOLING EXTRA 25.00". After rejection by respondents it was resold at a net of $380.56. Damages were originally claimed in the amount of $503.84 but subsequent to the filing of the complaint the amount claimed was reduced to $481.84.

In their answer respondents claimed the asparagus was not equivalent in size to that packed as Extra Fancy and Fancy, with a few larger, and that Federal inspection at Cincinnati indicated it was defective because of spreading heads, wilt and decay. Later respondents filed a statement of facts wherein it was stated that the basis of rejection was not as to size only but was as to condition and quality as well.

The asparagus was not inspected by a Federal or Federal-State inspector in California but was inspected by a Federal inspector at Cincinnati, Ohio, on April 20 and 23, 1936.

Ruling included in decision

The asparagus did not conform to the specifications of the contract of purchase and sale because it was not in suitable shipping condition. Both parties submitted evidence as to the quality, grade and condition. The evidence was considered but was entitled to little weight in view of the fact that there was a Federal inspection made. That inspection showed that the asparagus did conform to the terms and specifications of the contract as to size. It also showed that in the asparagus marked "fancy" and "extra fancy" 10% showed damage due to the spreading of the heads with an average of 4% wilt and an average of 6% showing decay. Of the asparagus which was termed "loose" there was an average of 7% damage due to the spreading of heads, 6% stalks wilted and 7% showing decay. This inspection showed that the asparagus did not conform to the specifications of the contract of sale because it was not in suitable shipping condition. Respondent's rejection was not without reasonable cause and the complaint was therefore dismissed.

S-1761, Dec. 13, 1937, Docket 2627: (S. P.)

LEEF, SOMMER & CO., NEW YORK, N. Y. v. JAMES TOZZI, MIAMI, FLA.

Violation charged: Failure to deliver a carload of tomatoes in accordance with contract specifications.
Principal points involved: Terms of contract must be shown before decision can be made; complainant must show violation; upon failure of principal to pay as agreed, agent has right to make other disposition of car purchased for principal.
Order: Complaint dismissed.

Outline of facts

The facts as stated by the parties showed that on or about March 3, 1937, complainants' agent, who was then located in Miami, Fla., inspected, accepted and purchased a carload of tomatoes from respondent for immediate shipment to complainants in New York, N. Y. Complainants stated that this agreement was reduced to writing but the record failed to contain any evidence of a written contract having been made and the telegrams placed in evidence failed to disclose all the details which complainants contended were included. In this respect complainants claimed that the shipment contained 600 lugs for which they contracted to pay $934; respondent contended that it contained but 580 lugs, for which the contract price was $801. Moreover, respondent contended that, due to difficulty in collecting from complainants on a former shipment, the tomatoes were not to be delivered until the contract purchase price had been paid. Complainants contended that they had purchased the tomatoes and accepted liability for the purchase price, which they were ready and willing to pay. As a result of complainants'

failure to wire the contract purchase price within the time allowed by respondent, respondent made other disposition of the shipment and complainants brought this proceeding to recover the damage alleged to have been sustained by them as the result of respondent's failure to deliver the tomatoes to them.

Ruling included in decision

The telegrams quoted in the decision constituted all the supporting testimony, other than the sworn statements of the parties themselves, which was contained in the record. It was, therefore, clearly evident that there was no showing of the terms of the contract which are pertinent and must be known before a decision with reference to the rights of the parties could be made. So far as the record disclosed, the agreement may have provided for the contract purchase price to be paid immediately on acceptance by complainants' agent, in which case respondent was within his rights in making other disposition of the car as he did in the instant case. Moreover, the wire sent by John J. Tozzi, Inc., quoted in the decision, stated that the complainants would pay for the shipment "if decide take it." This in itself was a strong indication that the complainants when first approached on the matter of payment may have indicated that they would reject the shipment if it failed to meet their ideas of what the quality and condition should be. It was, of course, useless to go into what the parties may have meant. The fact remained that it was first of all necessary for the complainants to clearly show a violation of the act by the respondent, and this complainants failed to do. The complaint was therefore dismissed.

S-1764, Dec. 13, 1937, Docket 2561: (S. P.)

GROWERS EXCHANGE, INC., NORFOLK, VA. v. ABE FELDMAN, PHILADELPHIA, PA.

Violation charged: Unjustified rejection of a car of spinach.
Principal points involved: "Normal transportation service and conditions" applies to performance by carrier and not to whether a specific protective service is normal; downy mildew 10% to 25%, averaging 15% to 20%, in 2-day haul is abnormal and indicates spinach was not in suitable shipping condition; loss must be proved.
Order: Complaint dismissed.

Outline of facts

On Dec. 8, 1936, through a broker, complainant sold to respondent one car of U. S. No. 1 curly Savoy Spinach at 55¢ per bushel f.o.b. The car was shipped from Virginia to Philadelphia, Pa., but upon arrival was refused by respondent. Complainant alleged that it was resold for a net of $220.83, and asked for damages of $164.17, the difference between the original sale price and the amount netted by resale.

Complainant contended that respondent specified that this car of spinach be shipped with no ice in the bunkers and with no ice inside the

car on top of the load; that this was an unusual method by which to ship spinach and the order was accepted on an f.o.b. Norfolk basis only and shipped solely at the respondent's risk. Complainant also contended that the normal and customary way to ship spinach from the Norfolk section at that season of the year is with top ice over the load and that normal service was not provided in this instance due to respondent's specific instructions that no top ice be used. As a basis for its contention, complainant called attention to the fact that the suitable shipping condition regulation refers to the shipment being handle "under normal transportation service and conditions." Complainant contended that this regulation did not apply to this case because the instructions of the respondent provided for shipment without bunker and top ice, which was not the customary or normal way to ship spinach at that time of the year.

Respondent denied that complainant tendered U. S. No. 1 spinach and maintained that the destination inspection and the appeal inspection showed the commodity was not in suitable shipping condition.

Federal-State inspection made at Berkley, Va., on Dec. 8 certified the spinach as of U. S. No. 1 quality. Federal inspection made of the car at destination on Dec. 10 showed downy mildew ranging from 10% to 25%--mostly 15% to 20%. On the following day, an appeal inspection was made which showed downy mildew ranging from 8% to 40%, mostly 15% to 25%.

Rulings included in decision

1. Complainant's contention in regard to the use of the words "Normal transportation service and conditions" was without merit. This part of the regulation pertaining to suitable shipping condition applies to the performance by the carrier in a normal manner of the services contracted for at time of billing. In other words "normal transportation service," as used in the regulations, was not intended to cover the point of whether or not a specified protective service is normal under the circumstances. The contention of the complainant could be sustained only if it were shown that the respondent did not give proper shipping instructions to the carrier and that this was responsible for the abnormal deterioration in transit.

2. The abnormal deterioration of the spinach while in transit showed that it was not in suitable shipping condition. The inspections clearly showed that the deterioration from Dec. 8 to Dec. 10 and 11 was abnormal. Although making statements that shipment without top ice was not customary during that season of the year from the Norfolk section, complainant wholly failed to submit any proof that top ice was required to carry the spinach to destination without abnormal deterioration. As a matter of fact, with only a two-day haul, the amount of downy mildew found in the car upon arrival at Philadelphia was very excessive. The complaint was therefore dismissed.

3. Respondent failed to show any loss because of complainant's failure to ship a car of spinach complying with the terms of the contract and his countercomplaint was therefore dismissed.

S-1768, Dec. 13, 1937, Docket 2580: (S. P.)

ARCH P. NARAMORE, WICHITA, KANSAS v. LELAND J. SOTO CO., SACRAMENTO, CALIF.

Violation charged: Failure to pay brokerage on the sale of a carload of tomatoes.
Principal point involved: Complainant's counter-offer was not accepted by respondent and therefore no contract was consummated and hence no brokerage earned.
Order: Complaint dismissed.

Outline of facts

On August. 11, 1936, respondent by telegram offered to complainant, in interstate commerce, tomatoes for sale, as follows: OFFER SUBJECT TO CONFIRMATION FOB SHIPPING POINT PROMPT SHIPMENT STONES HEAVY 6x6 AND LARGER 85% US1 $1 LUG ANSWER QUICK, which meant that under this offer and the regulations of the Secretary of Agriculture defining "prompt shipment" that the respondent had until midnight of Aug. 14 to make shipment. Later on Aug. 11, complainant, presumably on behalf of the Merchants Produce Co., submitted by telegram to respondent what amounted to a counter-offer, limiting the shipping date for the carload of tomatoes to August 12 "sure." The counter-offer was not accepted by respondent, which advised complainant by telegram Aug.12, that it had "previously booked up yesterday and today confirm car Merchants Produce tomorrow sure heavy 5x5 & 5x6." Respondent's said telegram of Aug. 12 was not replied to by complainant and respondent did not ship the tomatoes. Complainant claimed a brokerage of $25 on the sale of the car to Merchants Produce Co., Enid, Okla., with which company he had entered into negotiations in writing on or about Aug. 12 for one car of 85% U. S. No. 1 Stone tomatoes at $1 per lug.

Ruling included in decision

The counter-offer of complainant limiting the shipping date was not accepted by respondent. Under the circumstances, therefore, respondent was justified in not making shipment to the Merchants Produce Company, and it could not be considered the complainant earned a brokerage fee on the said car of tomatoes because of his failure to negotiate a valid contract of sale. Complainant's complaint was therefore dismissed.

S-1778, Dec. 18, 1937, Docket 2626: (S. P.)

WESCO FOODS CO., SUCCESSORS TO F. E. BALDWIN, INC., CHICAGO, ILL. v. GEORGE C. PALMER, INC., and/or PALMER-HEDBERG, INC., MINNEAPOLIS, MINN.

Violation charged: Failure to account for deficits on two carloads of potatoes.

Principal points involved: Unexplained unusual difference between price represented to consignor and actual price received resulted in dismissal; countercomplaint not filed within nine months' period considered as an answer and set-off against complainant's claim.

Order: Complaint dismissed; countercomplaint dismissed.

Outline of facts

On or about June 4, 1936, respondent informed complainant that it had a few cars of British Columbia Russet potatoes for sale, and desired to know what they would bring. Complainant, a few days thereafter, indicated to respondent that they would probably sell for from $4.25 to $4.75 per cwt., and relying on the representations made by complainant as to price, respondent shipped to complainant two carloads of potatoes from New Westminster, Canada, to Chicago, Ill. Complainant sold the potatoes, without advising respondent, for $1.55 per cwt., resulting in a deficit on both carloads in the total amount of $157.74, for which complainant asked an award.

Respondent filed a countercomplaint dated April 21, 1937, seeking reparation in the sum of $502.89 on one car and $499.37 on the other. It was stated by respondent that the quality of the potatoes was as represented, and that respondent was led to believe they would sell for $4.75 per cwt. at Chicago, and that they should not have been sold under $3 per cwt., the counterclaim being for the difference between carlot sales at that price per cwt. and the expenses and commissions shown by complainant.

Rulings included in decision

1. Respondent shipped to complainant a consignment of two carloads of potatoes, based on complainant's representation that they would sell for from $4.25 to $4.75 per cwt. but they were sold by complainant for $1.55 per cwt. without giving any satisfactory explanation for the most unusual difference in the actual price and the estimated price. Complainant's claim for reparation due to the deficit was therefore dismissed.

2. Respondent's counterclaim was not filed within the nine months' statutory period, and therefore was dismissed. However, it could be, and was considered as an answer, or in the nature of a set-off against the claim filed by complainant, which claim was filed within the nine months' statutory period.

S-1788, Jan. 4, 1938, Docket 2737: (S. P.)

CHAS. G. SUMMERS, JR., INC., NEW FREEDOM, PA. v. PIOWATY BROS., INC., CHICAGO, ILL.

Violation charged: Failure to deliver in accordance with contract two carloads of carrots.

Principal points involved: Three months' delay in purchasing replacement cars was unreasonable time; failure to show that carrots purchased as replacements were of same grade and quality as called for in broker's confirmation of sale, purchase of cars greatly in excess of minimum weight and delay necessitated dismissal.

Order: Complaint dismissed.

Outline of facts

The evidence disclosed that complainant and respondent had numerous dealings in the recent past. Between Oct. 12 and Oct. 30, 1936, respondent sold to complainant 15 carloads of carrots. On Sept. 30, 1936, the broker prepared a so-called confirmation of sale covering the sale of 4 cars of U. S. No. 1 Canners Carrots, sacked, at $24 per ton f.o.b. to complainant, "shipments via PRR 1 5th 1 6th 1 8th and 1 9th - weather permitting," for the account of John M. Chamberlain, Newark, N. Y., who was at that time an employee or agent of respondent. Respondent failed to ship from loading points in the State of New York, to complainant at New Freedom, Pa., two of the carloads of carrots and complainant contended it suffered damages of $180, being the difference between what the two carloads would have cost if they had been delivered by respondent and the cost of replacement purchases.

Respondent contended that the contract of sale was made with Chamberlain in his individual capacity and not as its agent, and filed a sworn statement of facts stating that on Nov. 21, 1936 there appeared in The Packer a notice that John N. Chamberlain was no longer connected in any capacity with respondent and that this was known to the entire industry.

Respondent had no actual notice of this contract until the latter part of December, 1936, or the first part of January, 1937. On January 7, 1937, complainant wired respondent at Chicago: "YOU OWE US TWO CARS CARROTS TO BE SHIPPED BY CHAMBERLAIN NEWARK NEW YORK STOP FINCH OR WE UNABLE TO GET CHAMBERLAIN TO SHIP * * *." On Jan. 8, respondent wrote complainant: "* * *This comes to us as a surprise. Our Mr. Bergart, who was also at Newark when we closed that office, advises he knew nothing about it. * * *".

Ruling included in decision

Complainant waited for more than a reasonable time before purchasing two carloads of carrots to replace those called for in the contract. According to complainant's contention and the so-called confirmation of sale, relied upon by complainant, the last car was to have been shipped on or about Oct. 9, 1936, and no demand was made upon respondent until two or

three months later. Respondent stated that the market for carrots had advanced and the first replacement carload was not purchased by complainant until Jan. 19, 1937, or more than three months after the last carload was to have been shipped under the original contract. Furthermore, complainant did not show that the two carloads of carrots purchased to fulfil the order were of the same grade and quality as those covered by the so-called broker's confirmation of sale. Moreover, the minimum carload weight of carrots is 24,000 pounds, while the weight of the two carloads purchased by complainant in lieu of those which it claimed respondent should have shipped was considerably in excess of the minimum weight, as one weighed 30,000 pounds and the other 35,000 pounds. It appeared, therefore, that complainant wholly failed to sustain the burden of proof and the complaint was therefore dismissed.

S-1791, Jan. 4, 1938, Docket 2816: (S. P.)

MUSANTE-BERMAN-STEINBERG CO., INC., BRIDGEPORT, CONN. v. ADAM HEBELER & CO., NEWARK, N. J.

Violation charged: Failure to deliver a carload of apples in accordance with contract.
Principal point involved: It was incumbent on complainant to establish its case by a fair preponderance of the evidence.
Order: Complaint dismissed.

Outline of facts

On April 9, 1937, complainant and respondents, through a broker, entered into negotiations for the purchase and sale of a carload of apples to be shipped from Winchester, Virginia, to Bridgeport, Conn. Complainant claimed to have bought a car of U. S. No. 1 York Imperials, $2\frac{1}{2}$ inches and up, at the agreed price of $1.90 per bushel delivered; that respondents failed to ship the apples, which should have been shipped April 10 and should have arrived April 13; and claimed damages in the sum of the difference between the contract price of $1.90 per bushel and the market price of $2.25 per bushel at Bridgeport on April 13, for apples of like kind and quality, or 35¢ per bushel on a carload of 528 bushels, making a total of $184.80.

Respondents denied that any contract was entered into.

Ruling included in decision

Complainant failed to establish by a fair preponderance of the evidence that it negotiated a contract of purchase and sale for the apples in question. The evidence in this case was in direct conflict and was based entirely upon telephone conversations. The complaint was therefore dismissed.

S-1794, Jan. 6, 1938, Docket 2676: (S. P.)

AMERICAN PRODUCE SUPPLY CO., SEATTLE, WASH. v. C. M. BROWN, REDLANDS, CALIF.

Violation charged: Failure to deliver a shipment of oranges.
Principal point involved: Seller had reasonable cause for failure to ship when he had the oranges ready but truck designated by complainant failed to arrive until shipment held up by State officials because of supposed frozen condition.
Order: Complaint dismissed.

Outline of facts

On or about Jan. 12, 1937, by contract in writing, respondent sold to complainant 200 boxes of oranges at prices varying from $1.40 per box to $1.90, depending upon the size of the oranges, or a total contract price of $352.20 f.o.b. Redlands, Calif., to be shipped from Redlands to Seattle, Wash. It was agreed between the parties that they were to be loaded in the truck or trucks of the Hendricks Truck Co. which was employed by complainant to haul them. Complainant guaranteed payment for the oranges by a bank draft upon presentation of a trucker's shipping receipt. On Jan. 13, respondent wired complainant that the guarantee had been received, asking where the truck was, and stating that the oranges were ready. On the same day, respondent telephoned Hendricks Truck Co. and was informed that the trucks were delayed and it was not known when one would be available. Again on the same date, respondent telegraphed complainant that arrangements must be made for hauling and that the Hendricks truck was not available until the last of the week, and should be in then. Complainant replied and directed respondent to hold the oranges. Subsequent to Jan. 13 and prior to Jan. 19, cold weather prevailed in Redlands, Calif., and the State of California officials would not permit the oranges to be shipped. The 200 boxes of oranges had been placed in the packing house prior to the freezing weather, but, according to the State officials, they showed freezing injury slightly in excess of the tolerance. Respondent contested the ruling and finally prevailed in the State court. The truck did not arrive until Jan. 19 or 20, and respondent was not permitted to ship the oranges at that date. Complainant claimed damages of $327.80, based on the difference between the contract price and the market price less truck charges of 60¢ per box.

Ruling included in decision

The record indicated that neither party anticipated the freezing weather that followed Jan. 13, which was the cause of the State officials forbidding the movement of the 200 boxes of oranges then in the packing house and ready for shipment. Following the freezing weather, the oranges could not be shipped because the State officials thought that some of the oranges were frozen in excess of the tolerance. Apparently this was an error and the respondent instituted suit in court and the order of the State was set aside. However, the decision came too late to ship the oranges. The contract of purchase and sale called for prompt shipment, and the oranges were ready for shipment on Jan. 13. It seemed that respondent was ready to comply with his agreement to sell and deliver in accordance with the terms

of the contract, and that complainant, who had designated the Hendricks Truck Company to haul the oranges, should be the one to suffer rather than the respondent for the failure of the trucking company to have a truck at Redlands on or about January 13. It could not be said, therefore, that respondent failed to ship the oranges without reasonable cause, and the complaint was therefore dismissed.

S-1795, Jan. 6, 1938, Docket 2674: (S.P.)

J.P. McADAMS & CO., INC., NEW HAVEN, CONN. v. ADAM HEBELER & CO., NEWARK, N.J.

Violation charged: Failure to account for brokerage.
Principal point involved: It was incumbent upon complainant to establish its case by a fair preponderance of the evidence.
Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on or about April 9, 1937, respondents by telephone sold through complainant, as broker, 3 carloads of U.S. No. 1 York Imperial apples at the agreed price of $1.90 per bushel delivered on 2 cars and $1.75 f.o.b. on the third car, shipment to be made from Winchester, Va. to purchasers at Bridgeport, Waterbury, and New Haven, Conn. Complainant sought an award for $60 to cover brokerage fees on the sale of the cars.

Respondents contended that complainant claimed to be the representative of the American Fruit Growers, Inc., of New Havon; that American Fruit Growers Inc., at New York stated complainant did not represent them; that complainant was then advised it would be necessary to have a bank guarantee and that the memorandum of sale on each car would be disregarded unless it showed the terms payable by bank guarantee upon presentation of U.S. No. 1 Government inspection certificate/ Winchester acceptance; and that respondents received no corrected memoranda and "considered the deal off."

Complainant filed a sworn statement of facts stating the terms of sale were agreed upon in a telephone conversation and respondent was informed complainant was the duly authorized agent in the State of Connecticut for the American Fruit Growers, Inc.; that on April 10, in a telephone conversation with respondents, complainant was informed that a partner in the transaction had had trouble with the three purchasers and it was necessary that there be a bank guarantee covering the invoices; that the demand was modified to $200 per car and the customers accordingly notified, but that they saw no necessity for such a deposit or guarantee.

Ruling included in Decision

Complainant failed to establish by a fair preponderance of the evidence that it negotiated contracts for the purchase and sale of the three carloads of apples. The evidence disclosed that the negotiations for the purchase and sale of the three carloads of apples were over the long distance telephone. Complainant contended that respondents confirmed the sale of the apples and respondents denied this. There were also conflicting statements as to what representations were made by complainant regarding its affiliation with the American Fruit Growers, Inc. The complaint was therefore dismissed.

S-1796, Jan. 6, 1938, Docket 2720: (S.P.)

EVELOFF & SAVITZ, PHILADELPHIA, PA. v. S.R. MOYER, MOUNT CARMEL, PA.

Violation charged: Failure to account for a carload of lettuce.
Principal point involved: Complainant failed to prove the existence of a contract of sale.
Order: Complaint dismissed.

Outline of Facts

On or about April 22, 1937, complainants and respondent entered into negotiations over the long distance telephone for the handling of a carload of lettuce which was shipped from Phoenix, Arizona, to Mount Carmel, Pa. Complainants contended that the lettuce was sold to respondent at $2.65 per crate, less freight charges to Mount Carmel, making the total net price $390.84.

Respondent denied that he purchased the lettuce, but contended that he only agreed to handle the shipment on consignment, that the lettuce was sold for the best price obtainable and respondent accounted to complainants for the net proceeds. Respondent filed a deposition taken pursuant to authority granted by this Department, which supported the allegations set forth in the answer. In addition, three depositions of employees and associates of respondent, which were taken pursuant to authority of this Department, were filed.

Ruling included in Decision

Complainants failed to establish by a fair preponderance of the evidence that there was a purchase and sale of the lettuce in question. All the depositions submitted by respondent supported or tended to support the answer sworn to by respondent. The record showed that respondent tendered his check to complainants for the net proceeds received from the sale of the lettuce. The complaint was therefore dismissed.

S-1797, Jan. 6, 1938, Docket 2484: (S.P.)

THE I. ROTHSCHILD PRODUCE CO., GREELEY, COLORADO v. PETE HUMPHRIES CO., PARIS, TEXAS.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: Erroneous billing and failure of complainant promptly to release carload furnished reasonable cause for respondent's refusal to accept, damage to potatoes being caused by six days delay on track attributable to complainant.

Outline of Facts

On or about September 18, 1936, through a broker, by contract in writing, complainant sold to respondent one carload of U.S. No. 1 Triumph potatoes, containing 360 bags, at the agreed price of $2.40 per cwt. delivered, less freight of $237.60, or a total net sales price of $626.40. The potatoes were shipped by The Farr Co. on September 17, from Cottier, Wyoming, to itself at North Platte, Nebraska and on September 18, the car was diverted by the shipper to complainant, Paris, Texas, advise Pete Humphries Co. It arrived at Paris September 21, at 8:30 p.m., was placed for delivery that day, and respondent notified September 22 of its arrival. Complainant mailed a delivery order with bill of lading and draft attached to the Citizens National Bank, Paris. This appeared to have been an error by complainant, for there was no bank by that name located in Paris. Complainant apparently, after being advised of the error, mailed a delivery order with bill of lading and draft attached, October 1, 1936, to the Liberty National Bank, Paris, which was received by the bank on October 3. The record showed that respondent was unable to obtain delivery without the delivery order and it was not until September 28 that the car was released to respondent under complainant's instructions to the carrier. Within one hour after the release on September 28, respondent had inspected the shipment and notified the broker that the shipment was rejected because of the decayed condition of the potatoes, but that it would accept the car if protected against loss resulting from decay or that it would accept a replacement car of good potatoes. Complainant declined to give respondent credit for the amount of the decay, and declined to ship it another car of potatoes. Complainant thereafter resold the car for net proceeds of $293 and asked for damages of $333.40, the difference between the original contract price, $626.40, and net proceeds of resale.

Ruling included in Decision

The refusal of respondent to accept the potatoes was not without reasonable cause and was not in violation of section 2 of the Act. It clearly appeared that respondent used due diligence in promptly inspecting and rejecting the potatoes after the car was released to it, and that any damage resulting to the potatoes by reason of the fact that the car remained on the tracks for approximately six days was attributable solely to the complainant because of its failure to promptly furnish a delivery order or instruct the carrier to release the car to respondent. The complaint was therefore dismissed.

S-1800, Jan. 8, 1938, Docket 2691: (S.P.)

LITMAN PRODUCE COMPANY, KANSAS CITY, MO. v. FARMERS DISTRIBUTING CO., INC., PHOENIX, ARIZONA AND WESCO FOODS CO., KANSAS CITY, MO.

Violation charged: Failure truly and correctly to account.
Principal points involved: Secretary may take judicial notice of Government market reports; acceptance of allowance offered precludes granting of additional allowance.
Order: Complaint dismissed.

Outline of Facts

On or about July 18, 1936, through Wesco Foods Co., a broker, complainant purchased from Farmers Distributing Co. a carload of cantaloupes to consist of 53 crates of Jumbo 27's, 259 crates of Jumbo 36's and 12 Flats. The cantaloupes were shipped from Alhambra, Arizona, to Kansas City, Mo., where they arrived on or about July 19. Complainant discovered there were 259 crates of Jumbo 27's and 53 crates of Jumbo 36's and thereupon wired Farmers Distributing Co. Complainant asked for an allowance of 25¢ per crate but Farmers Distributing Co. agreed to make an allowance of 10¢ per crate because of the error in size. This allowance was not satisfactory to complainant and on July 19, Farmers Distributing Co. attempted to divert the car from Kansas City. However, complainant had unloaded the car and made no further complaint until July 24, when it telegraphed Farmers Distributing Co. that payment was being withheld because the size did not conform to contract specifications.

Farmers Distributing Co. claimed that on July 17, two days prior to the arrival of the car, a wire was sent correcting the manifest, and that a copy of the manifest was tacked just inside the car door plainly visible to anyone opening the car; that a 10¢ allowance was agreed to, that this was a fair average allowance for the error, which made the net proceeds of $259.70 received by this respondent, fair and reasonable, and that the market reports did not justify the exorbitant figures set forth by complainant as to its alleged loss.

Wesco Foods Co. stated it acted as broker for a disclosed principal and that after negotiating the sale and receiving the brokerage fee it had no control whatever over the cantaloupes shipped as complainant was billed direct by Farmers Distributing Co.

Rulings included in Decision

1. Wesco Foods Co. acted as broker and the record did not disclose that it was at fault in handling the transaction. The complaint was therefore dismissed as to Wesco Foods Co.

2. The cantaloupes did not conform to the specifications of the contract of purchase and sale as to size, but complainant finally agreed to accept an allowance of 10¢ per crate and for this reason no additional allowance for damages could properly be granted to complainant. It was true that complainant desired an allowance of 25¢ per crate but 10¢ finally was accepted. Complainant attempted to establish damages by showing the prices at which the cantaloupes were sold from July 20 to 31, inclusive. The Secretary of Agriculture may take judicial notice of the reports of the market prices issued by the Bureau of Agricultural Economics. The prices for cantaloupes on July 18, 1936, which was the date the contract was entered into, were shown to be higher than they were at any time subsequent to July 31. Between July 22 and 31 there were not enough sales of cantaloupes arriving by rail to quote. During this time homegrown cantaloupes were arriving in Kansas City and the market was lower than it was on July 18, 19 or 20. The prices on cantaloupes sold by complainant on July 20 were materially higher than on those sold the latter part of July. The complaint was dismissed as to Farmers Distributing Co. Inc.

S-1801, Jan. 8, 1938, Docket 2505: (S.P.)

THEODORE SCHMITZ, INC., NEW YORK, N.Y. v. J. EDWARD McGOWAN, MARLBORO, N.Y.

Violation charged: Failure to deliver apples in compliance with contract.
Principal points involved: Having failed to show authorization to handle 348 bbls. on consignment, complainant must account at the agreed purchase price; settlement between parties permits dismissal
Order: Complaint dismissed.

Outline of Facts

On or about March 9, 1936, complainant and respondent entered into an oral agreement in "interstate or foreign commerce" whereby complainant purchased from respondent 548 bbls. of Ben Davis apples at the agreed price of $2.40 per bbl. "f.o.b. steamer, New York," for export to Europe. The apples were delivered by respondent at Jersey City, N.J., for export, and complainant paid to respondent $1095.20 on account at the time they were delivered at the wharf. One lot of 200 bbls. failed to meet U.S. standards for export because of scald in excess of the tolerance of 2% allowed, and was therefore not up to contract requirements. Complainant promptly notified respondent that because of the failure of this lot to meet contract requirements it would be necessary to handle the three lots on consignment, to which complainant contended respondent agreed. Complainant consigned the entire 548 bbls. and accounts sales in the record showed complainant received a total sum of $877.05, which failed to equal the advance of $1095.20 by $218.15 and an award was therefore asked for $218.15 plus a commission of 10¢ per bbl., or $54.80, and an unexplained item of $10, or a total of $282.95.

Respondent admitted he agreed to deliver to complainant apples suitable for export and that the lot which failed to meet these requirements should be handled by complainant on consignment, but denied that such an agreement was entered into with reference to the other lots which did meet export requirements.

Ruling included in Decision

Complainant failed to prove that the consignment agreement included more than the 200 bbl. lot which failed to meet export requirements. It was clearly shown that one lot of 108 bbls. showed no evidence of scald and that another lot of 240 bbls. showed 1% slight scald, which is well within the tolerance allowed for export certification. Both of these lots, therefore, met the requirements of the U.S. Standards for export. Under these conditions, it appeared that complainant should account to respondent for the full contract price of $2.40 per bbl. for each of the lots of 108 bbls. and 240 bbls., or for the total sum of $835.20. The third lot, which was properly handled by complainant on consignment, showed a net return of $283.70, from which should be deducted $52.50, which respondent admitted should be charged against him, thus leaving a difference of $231.20 to be credited to respondent on this lot. The sums of $835.20 and $231.20, or a total of $1066.40, should therefore, be credited against the advance of $1095.20, thus leaving a difference of $28.80 in complainant's favor. Since there was no showing of authority for the deduction of the $10 charge by complainant, it was ignored. A letter written to the Department by complainant under date of August 25, 1937, acknowledged the receipt of $50 from respondent to be credited on the transaction. It therefore appeared that respondent had settled with complainant in full, including interest, and the complaint was therefore dismissed.

S-1802, Jan. 8, 1938, Docket 2677: (S.P.)

G. HENRY CADMAN, LARGO, FLA. v. S.S. COACHMAN & SONS, CLEARWATER, FLA.

Violation charged: Failure to account for 189 boxes of oranges.
Principal point involved: The contract did not cover fruit condemned by State and Federal inspectors.
Order: Complaint dismissed.

Outline of Facts

On or about February 28, 1936, by contract in writing, complainant sold, at $1.50 per box, to respondents a crop of Valencia oranges then hanging on the trees at Largo, Florida, to be picked and disposed of before March 15, 1936, which date later was extended to suit the convenience of respondents. Respondents picked 1473 boxes of oranges and paid for 1284 boxes which were shipped in interstate commerce. Complainant asked an award of $283.50 to cover the balance of 189 boxes at $1.50 per box.

Respondents claimed that the contract covered only merchantable fruit and that the 189 boxes, having been picked by respondents' picking crew at complainant's insistence, were delivered to respondents' packing house and were inspected and condemned by both State and Federal inspectors as being immature and unfit for human consumption. Complainant maintained that the oranges were sold with the assurance that all the fruit was covered by the agreement.

Ruling included in Decision

Respondents' statement in their sworn answer that 189 boxes were immature and unmerchantable, and for those reasons were condemned by both Federal and State inspectors, was not denied by complainant. The contract read, in part: "It is mutually agreed that in the event any governmental, or other agency, imposes regulations apparently valid from a source apparently possessing authority preventing at any time during the life of this contract the shipping and interstate movement of any part of said fruit purchased under this contract, then in that event Purchaser will not be required to pay Grower for that portion of said fruit covered and withheld from market by virtue of such regulations." Under this portion of the contract, respondents were not required to pay the complainant for oranges that were not permitted to move in interstate commerce, after condemnation by the inspectors. The complaint was therefore dismissed.

S-1805, Jan. 11, 1938, Docket 2681: (S.P.)

DYER AND MOON PRODUCE CO., ST. LOUIS, MO. v. H.W.BIRD and/or FLORIDA EAST COAST GROWERS ASSOCIATION, MIAMI, FLORIDA.

Violation charged: Failure to deliver a carload of tomatoes in accordance with contract specifications.

Principal points involved: Almost daily rainfall over eastern Florida and no evidence that shipper could have purchased similar tomatoes to fulfill contract indicated failure to ship tomatoes "suitable for repacking" was not without reasonable cause; market value of Florida tomatoes not proved by market value of Mexican tomatoes.

Order: Complaint dismissed.

Outline of Facts

On or about February 4, 1936, through a broker, by contract in writing, complainant purchased from respondent one carload of Florida tomatoes, size 6x6 and larger, at $1.35 per lug, and not over 100 lugs of size 6x7, at $1.10 per lug, f.o.b. Florida shipping point, shipment "As soon as possible." On or about February 20, respondent shipped a car of tomatoes from Peters, Florida to complainant at St. Louis, Mo. which complainant rejected upon arrival because it contained more than 100 lugs of size 6x7, namely, 126 lugs, and because the tomatoes did not meet the specification of the contract which called for "Straight Pack Quality suitable for repacking." Complainant asked for $472.50 damages, representing the difference between the market value of Mexican repacked tomatoes February 4, at $3 per lug for 630 lugs, and $3.75 per lug, the market value of Mexican tomatoes February 10, the earliest date that the said carload of tomatoes could have been available had the respondent shipped it promptly.

Rulings included in Decision

1. The record disclosed that it rained in eastern Florida practically every day from February 4, 1936, the date of the contract, to February 20, 1936, the date of shipment, which made it impossible for respondent to ship tomatoes of a quality "suitable for repacking," and that respondent advised the broker, but upon the suggestion of the broker to ship to complainants the "best quality available" the respondent shipped the said car of tomatoes "with understanding they will accept shipment though not suitable for repacking." In view of the facts that there was an almost daily rainfall at shipping point, that it appeared to have been general over eastern Florida, and that no evidence was submitted tending to show respondent could have gone out and purchased tomatoes of a similar kind, size and quality elsewhere to fulfill its contract, the failure of respondent to ship tomatoes "suitable for repacking" was not, under the circumstances, without reasonable cause.

2. Under the provision "Shipment as soon as possible" specified in the contract of purchase, complainant had the right any time after twelve days from the date of the contract to cancel the contract of purchase. Although notified of the existing conditions he failed to avail himself of this privilege. In holding that the failure of respondent to ship tomatoes of a quality suitable for repacking was not without reasonable cause under the circumstances of this case, full consideration also was given to the evidence which showed that respondent several times advised the broker, who also acted in this transaction as agent for complainant, of the quality and condition of the tomatoes resulting from the almost daily rainfall, and that it was upon the suggestion of the broker to "give them best quality available" that respondent finally shipped the said car of tomatoes.

3. Complainant failed to show any relationship between Mexican tomatoes and Florida tomatoes for the said period. Without such showing, the market value of Mexican tomatoes could not be accepted as proof of the market value of Florida tomatoes. Complainant therefore failed to prove the amount of damages claimed and the complaint was dismissed.

S-1806 Jan. 11, 1938, Docket 2663: (S.P.)

PIONEER VEGETABLE EXCHANGE, INC., LOS ANGELES, CALIF. v. S.H. BODDINGHOUSE and/or GUST RELIAS, CHICAGO, ILLINOIS.

Violation charged: Unjustified rejection of a carload of tomatoes.
Principal points involved: Labor troubles do not excuse shipper from making delivery; responsibility for prompt loading was on shipper; duty of broker to keep buyer advised.
Order: Complaint dismissed.

Outline of Facts

On or about October 5, 1936, by exchange of telegrams, complainant sold to Gust Relias, through S.H. Boddinghouse, a broker, a carload of tomatoes, straight pack 6x6 or larger, at $1.15 per lug for 85% U.S. No. 1 or better, and 65¢ per lug for U.S. No. 2, f.o.b. Los Angeles, Calif., making the total contract price $664.25. The tomatoes were shipped from Los Angeles to Chicago, Illinois but were rejected by Relias and were then resold by complainant for the net price of $249.45, resulting in damages to complainant of $414.80, for which an award was asked.

Complainant filed a sworn statement of facts, stating that one small load of not more than 25 or 30 lugs was packed and loaded on October 10; that on account of strikes among field workers it was impossible to secure any field labor to harvest the tomatoes and for that reason packing ceased; that packing was resumed on October 13 and loading of the car finished on the 14th. Complainant also said that Boddinghouse was asked if it would be satisfactory to include 25 No. 2s and that he replied in the affirmative. Government inspection certificate and manifest were airmailed on October 15 after securing Boddinghouse's approval to ship and no objection was made until October 22. Complainant contended that Boddinghouse had no authority to insert in the memorandum of sale "six sixes and larger."

Gust Relias contended his rejection was justified for three reasons: First, that the tomatoes ordered were to be 6x6 and larger: second, that he ordered straight and not "standard" pack; and third, that there was a misrepresentation of the facts regarding the date of shipment. He further said he was not responsible for the strike and labor trouble, and that it is contrary to trade practice to ship tomatoes which require four days for packing.

Federal-State inspection certificate dated October 14, 1936, read, in part: "**Mostly extra row pack, some straight pack, some lugs packed with 7x7 center and bottom layer with 6x6 tops. The inspection certificate showed that there were 31 lugs which graded U.S. No. 2 and that inspection and loading commenced October 10, 1936.

Rulings included in Decision

1. The tomatoes did not conform to specifications of the contract of sale and Gust Relias' rejection was not without reasonable cause. He ordered tomatoes that were 6x6 and larger, straight-pack, and expected the tomatoes to be loaded promptly and not over a period of approximately 4 days. Complainant attributed the delay in loading to labor troubles. However, it was incumbent upon complainant and not respondent Relias to see that the loading was done reasonably promptly without having some tomatoes remain in the car for 3 or 4 days before being shipped. The complaint was therefore dismissed as to Gust Relias.

2. Complainant contended that S.H. Boddinghouse was advised about the strike of the laborers which caused the delay in loading, and about the size and pack of the tomatoes. However, the record did not indicate that the broker informed Gust Relias concerning these matters. If this be true, the broker was remiss in performing his duty. However, in this case the evidence was hardly sufficient to warrant an award of damages against the broker, particularly in view of the fact that complainant in its telegram of October 14 did not state accurately when the tomatoes were loaded. The complaint was therefore dismissed as to S.H. Boddinghouse.

S-1818, Jan. 19, 1938: Docket 2246: (S.P.)

V. FAMULARO & SONS, DENVER, COLO. v. ASSOCIATED VEGETABLE SHIPPERS, HYNES, CALIF.

Violation charged: Failure to deliver cauliflower, radishes and eggplant contained in a car of mixed vegetables, of the grade specified in the contract.
Principal point involved: Inspection four days after arrival of vegetables too late to constitute satisfactory evidence of condition, in f.o.b. sale.
Order: Complaint dismissed.

Outline of Facts

On or about January 27, 1936, through a broker, by contract in writing, respondents sold to complainant a car of mixed vegetables of good U.S. No. 1 quality, at various prices f.o.b. Hynes, Calif. On January 28, the car was shipped by respondents to Denver, Colorado where it arrived February 2. Complainant claimed the cauliflower, radishes and eggplant did not conform to contract specifications and to have been damaged in sum of $163.40, representing the difference between what the commodities would have been worth had they met contract specifications and their market value as actually delivered. Complainant further claimed the sum of $15 which he alleged respondents agreed to allow as a deduction on a former shipment by reason of the condition of certain commodities contained in that shipment.

Respondents were duly served with a copy of the complaint and exhibits but failed to file a formal answer. However, informal answer was made in which they set up as their defense that the car was not rejected within the prescribed time authorized by the trading rules and that the produce was inspected in the complainant's warehouse four days after the car arrived, during which time the deterioration developed.

On February 6, four days after arrival at Denver and after being transported to complainants' warehouse, complainant obtained a Federal inspection of the cauliflower and radishes, which inspection disclosed that the cauliflower failed to meet the requirements of U.S. Grade No. 1 on account of grade defects greatly in excess of the tolerance and that the radishes failed to meet the requirements of U.S. Grade No. 1 "on account undersize and irregularity in size." There was no official inspection of the eggplant.

Ruling included in Decision

The evidence disclosed that the complainant accepted and placed the cauliflower, eggplant and radishes in its warehouse and did not obtain a Federal inspection until four days later. This inspection, under the circumstances, was too late to constitute satisfactory evidence as to the condition and identity of the vegetables. Also, there was no proof of the alleged agreement between the parties with reference to the allowance of $15 on the prior shipment because of the condition of the shipment. The complaint was therefore dismissed for lack of proof.

S-1821, Jan. 19, 1938, Docket 2538: (S.P.)

S. GOLDSAMT, INC., NEW YORK, N.Y. v. D.C. SIMMONS, INC., UTICA, MISS., and JOSEPH F. RINN, NEW YORK, N.Y.

Violation charged: Failure to deliver in accordance with contract a carload of tomatoes.
Principal point involved: Shipper or broker not liable to buyer for error of telegraph company as to car number in absence of showing of neglect or bad faith.
Order: Complaint dismissed.

Outline of Facts

On or about June 9, 1936, complainant purchased a carload of tomatoes from D.C. Simmons, Inc., through Joseph F. Rinn, broker, which tomatoes were then shipped in car IC 653003. D.C. Simmons, Inc. wired the broker that the tomatoes were shipped June 9 in IC 653003, but the telegraph company in transmitting the message to the broker erroneously stated the car number to be IC 655005. On June 11, while the car was still in transit, complainant made resale of the tomatoes to a company at Springfield, Mass., and thereafter complainant filed diversion orders with the originating and connecting carriers, but, due to error in the car number, the load was not diverted and the tomatoes were not delivered to the Springfield company, which has filed a complaint with the department praying for damages against complainant for alleged losses suffered due to failure to make delivery.

Ruling included in Decision

The evidence failed to show a failure to deliver "without reasonable cause." It has been held in several cases that such phrase means some form of neglect or bad faith. There was nothing in the evidence in the instant case that either the broker or the shipper, named as joint respondents, acted in bad faith or failed to exercise due care in furnishing complainant with the correct car number. They employed the means generally used by the trade under similar circumstances. The complaint was therefore dismissed.

S-1830, Jan. 27, 1938, Docket 2711: (S.P.)

PASKOFF BROS. & CO., PITTSBURGH, PA. v. H.G. MILES & CO., INC., NEW YORK, N.Y.

Violation charged: Failure to ship a car of potatoes in compliance with contract specifications.
Principal point involved: Neither party established its claim for damages by a fair preponderance of the evidence.
Order: Complaint dismissed.

Outline of Facts

On or about March 12, 1937, through a broker, by written contract, complainants purchased from respondent a carload, 600 bushel boxes, of U.S. No. 1 Bliss Triumph potatoes, to be clean, bright, washed, "full pack", at a delivered price of $2.12 per bushel. The potatoes were shipped from Goulds, Florida and arrived at Pittsburgh, Pa. on the morning of March 14. Complainant contended that the potatoes were not "full pack" and therefore were not of the market value they would have been if packed as specified in the contract; that it was necessary to replace the car with another costing $1.65 per bushel box f.o.b. shipping point, which, with the addition of freight of 91¢ per cwt., amounted to a net price of $2.18 per bushel box on 548 boxes, resulting in damages of $32.88.

Respondent contended that the potatoes met contract specifications and that due to the rejection by complainant it should be awarded damages of $78.

Two Government inspections were made. The first, a restricted inspection, was made on March 17, at 8:45 a.m., and the Federal inspector stated that the pack was "tight" and also that the potatoes graded U.S. No. 1; the other, an unrestricted inspection, was made on March 18 at 2:15 p.m. by two Federal inspectors, one being the inspector who made the first inspection. The certificate covering the second inspection showed that the load was disarranged and reported under "condition of pack", "Mostly tight, irregularly throughout lower layers of load many crates filled to 1 to 3 inches of top."

Ruling included in Decision

Complainants relied largely upon the second inspection and the respondent upon the first one. Neither party obtained a Government inspection of the potatoes promptly upon their arrival at Pittsburgh, which was on the morning of March 14. The first inspection was not made until March 17 at 8:45 a.m. and the second on March 18 at 2:15 p.m. The first inspection tended to support the contention of respondent while the second tended to support that of complainants. When the first inspection was made, 3 boxes were open and 5 out of position, while at the time of the second inspection it was found that the load was disarranged and the contents of 2 crates spilled about the car. Under the unusual circumstances in this case, it was impossible to determine definitely from the record submitted what was the condition of the pack at the time the potatoes arrived; therefore, neither party established its claim for damages by a fair preponderance of the evidence, and the complaint and the countercomplaint were dismissed.

S-1839, February 25, 1938, Docket 2229: (Hearing)

PRENDERGAST BROTHERS, INC., GAGE, N.Y. v. THE SENECA FRUIT EXCHANGE, ROCHESTER, N.Y.

Violation charged: Failure truly and correctly to account for a carload of cabbage and a mixed carload of cabbage and pears.
Principal point involved: The terms of an agreement and facts in connection with the handling of produce must be shown.
Order: Complaint dismissed.

Outline of Facts

Complainant filed a complaint, alleging therein that two carloads of produce were handled under a joint account agreement and in the same paragraph stated that the produce was sold "on an F.O.B. basis." Likewise the pertinent exhibit attached to the complaint was inconsistent with either the usual joint account transaction or with a sale. The complainant's method of computing damages claimed to have been sustained by it was also inconsistent with either a sale or a joint account transaction.

Ruling included in Decision

In the absence of a definite showing of the agreement between the parties, as well as a failure to prove the facts in connection with the handling of the produce involved, it was impossible to reach a decision with respect to the rights of the parties and for this reason the complaint was dismissed.

S-1840, March 1, 1938, Docket 2718: (Hearing)

S. N. VARNELL, CLEVELAND, TENN. v. THE CASTILLINI CO., CINCINNATI, OHIO.

Violation charged: Failure truly and correctly to account for several carloads of peaches.
Principal point involved: Complaint dismissed upon amicable settlement being made.
Order: Complaint dismissed.

Outline of Facts

The complaint charged respondent with failure truly and correctly to account in full to complainant in connection with several carloads of peaches which were purchased by respondent from complainant's agent. Respondent stated in its answer that it knew only the agent in the transaction and in making settlement deducted the amount of indebtedness of the said agent incurred during previous transactions between it and the respondent and tendered the balance which was refused by both the agent and the complainant.

During the course of the hearing, the parties effected a satisfactory settlement which made it unnecessary to enter into a further discussion of the issues involved. This agreement included a stipulation that the complaint filed herein should be dismissed.

S-1841, March 1, 1938, Docket 2834, (S.P.)

R.E. ADAMS MARKETING CO., MOORESTOWN, N.J. v. C.A. GIOVIANAZZI, VINELAND, N.J.

Violation charged: Failure truly and correctly to account for the full purchase price of 225 bushels of yellow sugar corn.

Principal point involved: 35% defects of U.S. No. 1, consisting mostly of poorly filled ears and smut damage, and an average of approximately 10% serious worm damage, did not constitute good quality sugar corn.

Order: Complaint dismissed.

Outline of Facts

On or about July 9, 1937, complainant entered into an oral contract to sell to respondent 225 bushels of good quality yellow sugar corn at $1.30 per bu. f.o.b. a farm at Beverly, N.J., or a total contract price of $292.50. Respondent accepted the corn and trucked it to Boston, Mass., where it was sold on consignment for the account of respondent for an amount which netted respondent $150.23, which amount was paid to complainant. Complainant asked for an award of $142.27, the difference between the contract price of $292.50 and $150.23.

Respondent contended that he contracted to purchase U.S. No. 1 corn, free from worms and defects, and that the complainant represented to him at the time the contract was entered into that the corn complied with those specifications.

The record showed that respondent's consignee who disposed of the corn for respondent's account, upon receiving the shipment had it inspected by a Federal Inspector, whose inspection certificate showed, with respect to quality and condition, "Husks generally green and dry, a few turning brown. Ears mostly well to fairly well filled with plump, tender kernels; average approximately 35% defects of U.S. No. 1 grade, consisting mostly of poorly filled ears, some smut damage." "Average approximately 10% of ears show serious worm injury." With respect to grade, it showed "Stock does not meet requirements of U.S. grade No. 1 account of defects in excess of tolerance."

Rulings included in Decision

1. From the preponderance of the evidence it clearly appeared that the corn failed to meet U.S. grade No. 1 and also failed to meet the specification that it was free from worms and defects, or that it was good quality corn. The evidence also disclosed that the corn, due to serious defects, failed to meet the specifications as represented by the complainant to the respondent at the time the contract was entered into.

2. Respondent's failure to account to complainant for the full purchase price of the corn was not, under the circumstances, a violation of section 2 of the Act. The complaint was therefore dismissed.

S-1842, March 1, 1938, Docket 2746: (Hearing)

R. J. HEAD, PLANT CITY, FLA. v. LEON BROS., INC., BUFFALO, N.Y.

Violation charged: Failure truly and correctly to account for the agreed purchase price of a carload of eggplant and peppers.
Principal point involved: In a joint account venture either or both parties may be held liable by the vendor
Order: Complainant awarded $623.35 plus interest.

Outline of Facts

Complainant claimed that on or about June 5, 1937, he sold to Roy Hanchey, who in the transaction acted for himself and the respondent herein in a joint account venture, a carload of eggplant and peppers which was then in transit, consisting of 126 crates of Fancy eggplant at $1.25 per crate, or $157.50, 100 crates of No. 1 eggplant at 75¢ per crate, or $75; 80 crates of Fancy peppers at $3.25 per crate, or $260; 70 crates of No. 1 peppers at $2.25 per crate, or $157.50, and 50 crates of choice peppers at $1.40 per crate, or $70; the aggregate price being $720. The eggplant and peppers were consigned by complainant to himself at Potomac Yards, Va. and by him diverted, while in transit, on June 8, to respondent at Buffalo, N.Y. where they were delivered to respondent. Roy Hanchey remitted to complainant on the purchase price the sum of $96.65, at the direction of respondent, that sum being funds of respondent in the hands of Hanchey, and at the same time transmitted to complainant respondent's check for $623.35, which, upon presentation, was not paid.

Respondent contended that it did not purchase the commodities from complainant directly or through Roy Hanchey acting as its agent; that it was not established that Roy Hanchey was its agent; and that it was not authorized by its charter to engage in partnership transactions with any individual or corporation.

Depositions and testimony were offered in support of the contentions of the parties.

Ruling included in Decision

A letter from respondent to Roy Hanchey enclosing check for $623.35 in part payment for this carlot and calling attention to an overpayment of $110.40 on a previous car and directing application of that amount to the purchase price of this car, concluding: "Trusting this will be of good quality and will make us both some money**" (complainant's exhibit), taken into consideration with the typewritten invoice on this car, rendered by Roy Hanchey to respondent, dated June 9, 1937, bearing at the head "CAR JOINT ACCOUNT", and the admission of Frank Leon, President and Treasurer of respondent corporation, that this car was handled on joint account, clearly showed that the commodities were purchased by Roy Hanchey for himself and the respondent in a joint account venture. When such a relation is established, the vendor may hold either party, or both parties, liable for the contract purchase price. The Secretary found that the respondent failed truly and correctly to account for the produce in question and complainant was therefore awarded $623.35, plus interest, against respondent.

S-1843, March 1, 1938, Docket 2815: (Hearing)

ROBERT L. BERNER CO., INC., CHICAGO, ILL. v. LEON BROS., INC., BUFFALO, N.Y., and COUNTERCOMPLAINT.

Violation charged: Failure truly and correctly to account for the agreed purchase price of an l.c.l. shipment of artichokes and asparagus.

Principal points involved: Complainant should not rely solely on respondent's evidence to establish complainant's contentions; testimony of respondent merely as to statements made in counterclaim without other proof, is not of the definite affirmative, probative value required.

Order: Complaint dismissed; countercomplaint dismissed.

Outline of Facts

On or about February 25, 1936, complainant sold to respondent f.o.b. Chicago, Illinois, 50 boxes of artichokes, 80s - 110s, at $240 per box, or $120; and on or about February 26, 5 crates of bulk asparagus at $4.25 per crate, or $21.25; 5 crates of fancy asparagus at $4.25 per crate, or $21.25; 5 crates of extra fancy asparagus at $4.75 per crate, or $23.75; and 5 crates of select asparagus at $5.25 per crate, or $26.25. The aggregate agreed price for the artichokes and asparagus, including cartage of $3.50, amounted to $216. On February 26, complainant delivered on board car in Chicago, 50 boxes of artichokes and 20 crates of asparagus and they were transported to Buffalo, where, when tendered to respondent on February 28, it received them and paid the freight of $32.78, but declined to pay the contract price of $216 f.o.b. Chicago, because of their frozen condition. Respondent advised complainant that the produce arrived in a frozen condition, and, receiving no instructions from complainant, sold it for the alleged sum of $129.75, deducted therefrom freight of $32.78, and remitted $96.97 to complainant. Complainant contended that, with the exception of the artichokes, in which there was present slight field frost reported to respondent and accepted by it, the produce was in good condition, and asked for an award of $119.03, the difference between the purchase price of $216 and $96.97 remitted by respondent. Complainant offered in evidence the telegrams exchanged between the parties, the invoice, and the sales account rendered by respondent.

Respondent, in its countercomplaint, asked for recovery of damages in the sum of $100.67, consisting of prospective profits of $62.19, commission of $12.98, cartage of $3.50, cooler storage for thawing shipment $7, and for labor and reconditioning, $15. Respondent offered in evidence the report of the Railroad Perishable Inspection Agency and the Monthly Meteorological Summary of the Weather Bureau of the Department of Agriculture for the month of February, 1936, which showed for Buffalo, N.Y. and vicinity, a temperature range from February 27 from 45° F. to 20° F., and for Feb. 28 a range from 22° F. to 15° F., the dates mentioned being the time when the commodities were in transit from shipping point to destination.

Report of the Railroad Perishable Inspection Agency of inspection made at respondent's warehouse in Buffalo on February 28, showed that the artichokes were "good, few fair quality" of "good color except few slight brownish on outer scales"; and that the asparagus was "bunched and wrapped", except 5 crates of one grade which were loose, of "good color, clean, fresh and crisp". The report also showed "all boxes frozen at top side and ends to depth of 1/4 to 3/4 in." and "all crates frozen to depth of 1 to 2 outer stems at sides and all tips frozen."

Rulings included in Decision

1. In this proceeding, the one vital controversial question, as in all f.o.b. shipments, was that concerning the quality and condition of the commodities at the time of delivery to the carrier at the shipping point. To establish its contention that they were of good quality and in good condition - not frozen - complainant only made an assertion of fact and insisted that the report of the Railroad Perishable Inspection Agency and the Meteorological Summary of the Weather Bureau, both introduced by respondent, established its contention. These papers might furnish some evidence for the respondent and also a basis for argument in favor of either of the parties, but it could not be urged that they supplied the preponderance of evidence favorable to the complainant that was required of it in this proceeding. Complainant, instead of relying on the respondent to supply evidence to establish the quality and condition of the commodities at the time of delivery f.o.b. car at the shipping point, in ordinary prudence should have produced evidence from a disinterested source, such as a Federal inspection or a private inspection agency. The complainant having failed in its proof, the respondent was not bound under the contract to pay the contract purchase price, $216, f.o.b. shipping point. Since the complainant offered no evidence tending to show that the sales account as rendered by respondent did not represent the fair market value of the commodities at the destination, the complaint was dismissed.

2. Respondent, in support of its counterclaim, offered the evidence of Frank Leon, its President and Treasurer, who merely swore to its items set forth in the counterclaim, but offered no proof otherwise tending to establish any one of the items. Such evidence was not only not convincing but it was not of the definite, affirmative, probative value required of a party seeking to establish a counterclaim. Respondent's counterclaim was therefore dismissed.

S-1845, March 14, 1938, Docket 2730: (S.P.)

WILEMAN BROS. & ELLIOTT, CUTLER, CALIF. v. GEO. A. JENSEN & CO., SEATTLE, WASHINGTON.

Violation charged: Unjustified rejection of 300 chests of grapes.

Principal points involved: A strike at the docks at San Francisco, making impossible delivery F.A.S., in accordance with contract terms, was a hazard assumed by the seller; buyer not liable for loss of seller after shipment released to seller.

Order: Complaint dismissed.

Outline of Facts

On or about October 1, 1936, by contract in writing, complainant sold to respondent 250 chests of Fancy Emperor grapes at $1.90 per chest and 50 chests of Fancy Almeria grapes at $2 per chest, or a total of $623, F.A.S., San Francisco, Calif. The grapes were shipped from loading points in California, for export in foreign commerce, to the State Refrigeration Terminal in San Francisco, where they were placed in storage in complainant's name. Due to a strike on the docks of that city, complainant failed to make delivery F.A.S., San Francisco. By a letter dated November 18, complainant asked respondent whether, under the circumstances, it desired to cancel the contract, and stated to respondent that it expected "to go into Eastern markets with all our unsold grapes very shortly, otherwise we will consider them yours." Respondent replied on November 27: "***we would appreciate if you would hold them as long as possible and then let them go East with your other unsold stocks. *** We are leaving it in your hands to do what you think best right now." Complainant held the 50 chests of Almeria grapes in storage until December 14, and thereafter sold them on an eastern market for a net sum of $34.93, and the Emperor grapes were held in storage until December 31, and thereafter sold on an eastern market for a net sum of $367.18, or a total sum of $402.11. Complainant asked for an award of $220.89, the difference between the total contract price of $623 and the net amount received from the sales in eastern markets of $402.11.

Ruling included in Decision

The record disclosed that complainant failed to make delivery of the grapes in accordance with the terms of the contract of sale, due to a strike on the docks at San Francisco, and, therefore, failed to comply with the provisions of its contract. It further appeared that complainant held the grapes in storage until December 14 and December 31, after respondent had released them to complainant to dispose of in accordance with its best judgment. The record further disclosed that if complainant had disposed of them promptly on the eastern markets upon learning of the impossibility of making delivery thereof, in accordance with the terms of its contract, it would have suffered no loss. It was clear from the evidence that respondent was in no way responsible for the loss incurred by complainant. While it was true that the strike on the docks at San Francisco made it impossible for complainant to make delivery F.A.S., San Francisco, in accordance with the terms of the contract of sale, nevertheless, that was a hazard in connection with carrying out the terms of its contract of sale, which it must have assumed and for which respondent assumed no responsibility. The complaint was therefore dismissed.

S-1847, March 17, 1938, Docket 2621: (S.P.)

GORDON SEWALL & CO., INC., HOUSTON, TEXAS v. FRED HIGGINS, PHOENIX, ARIZONA.

Violation charged: Failure to deliver a carload of lettuce in accordance with contract.

Principal points involved: Confirmation of sale not submitted in evidence must be disregarded in reaching a decision; a broker's affidavit stating that 20 crates of lettuce were sold at stated prices was not evidence of the market value; some competent proof must be submitted to support contentions.

Order: Complaint dismissed.

Outline of Facts

On or about January 26, 1937, through a broker, respondent sold to complainant a carload of 80% U.S. No. 1 or better lettuce at the agreed delivered price of $3.60 per crate. A carload of lettuce which had previously been shipped from Arizona was diverted while in transit to complainant at Houston, Texas, upon whom respondent drew a draft for the net delivered purchase price of $790.20. Upon arrival at destination complainant paid the draft, and, after having made objection to respondent concerning the quality and condition of the lettuce, unloaded and disposed of it at a claimed net loss of $1.35 per crate, or $398.25, for which a reparation order was requested.

Respondent contended that the brokers' Standard Confirmation of Sale, a copy of which was delivered to complainant and to which complainant made no immediate objection, as required by the terms thereof, failed to specify that the lettuce was to be "80 percent or better U.S. No. 1."

Federal inspection was made at 1:00 p.m. on January 29, 1937. The certificate showed that: "Lettuce now fails to grade approximately 80% U.S. No. 1 quality account excess percentage discolored wrapper leaves and decayed."

Ruling included in Decision

All reference to the confirmation of sale must be disregarded since neither party saw fit to place a copy of it in the record. Any decision reached, therefore, must conform to the facts as disclosed by the exchange of telegrams which were properly presented for consideration. These telegrams supported the complainant's contentions with reference to the terms and specifications of the contract but afforded no proof of the claimed loss. The only evidence the complainant submitted tending to show the value of the lettuce delivered by respondent was an affidavit of a broker in Houston who stated that he was authorized by the complainant to sell the lettuce for $2.25 per crate but that he was able to interest only one buyer, who purchased ten crates at a price of $2.25 and who later purchased another ten crates direct from the complainant at the same price. This affidavit was not competent proof that the market value of the carload of lettuce was $2.25 per crate as claimed by complainant. Likewise complainant furnished no proof to show that lettuce of the kind and quality specified had a market value of $3.60 per crate. Hence it was held that the claimed loss was purely speculative. While the parties to a proceeding of this nature are not bound by the strict rules of evidence adhered to in courts, they must realize that even in administrative proceedings, such as this, at least some competent proof must be submitted to support their contentions, particularly with reference to the extent of the claimed loss. Since complainant failed to do this, the complaint was dismissed.

S-1853, March 22, 1938, Docket 2597: (S.P.)

LINDSAY FRUIT DISTRIBUTORS, INC., LOS ANGELES, CALIF. v. INTERSTATE BROKERAGE CO., and/or GENERAL PRODUCE CO., INC., BOTH OF DALLAS, TEXAS.

Violation charged: Unjustified rejection of a carload of lemons.

Principal points involved: Existence of binding contract must be proved; broker could not be held for misrepresentation of facts because seller later gave unconditioned confirmation of resale through same broker to another buyer.

Order: Complaint dismissed.

Outline of Facts

On or about July 21, 1936, complainant sold to Interstate Brokerage Co., as agent for undisclosed principals, one carload of lemons containing 154 boxes of Gold Tag brand at $6.50, 194 boxes of Silver Tag brand at $5, and 16 boxes of lemonettes at $4.50, delivered Dallas, Texas, or a total invoice value of $1480.37 net; which carload was then on track at Dallas, Texas, having been shipped from Los Angeles, Calif. on July 14, 1936. Interstate Brokerage Co. thereafter advised complainant that it had sold the car to a pool of buyers, but that they refused to accept and that General Produce Co., Inc. would accept the shipment on the same terms, provided complainant would bill the car open to General Produce Co. Complainant refused to do that and advised Interstate that it intended to hold the latter responsible for delivery of the shipment. Thereafter Interstate advised complainant that it had an offer from the Southern Ice Co. at Denison, Texas, at the prices originally agreed to, subject to inspection and acceptance at Denison. Complainant confirmed this offer and instructed the broker to divert to Denison, but upon arrival there Southern Ice Co. rejected the shipment. Complainant rediverted the car to New Orleans, La., where the lemons were sold in job lots, resulting in net proceeds of $997.48, and complainant asked for damages of $482.89, the difference between the contract price of $1480.37 and the amount realized on resale.

Interstate Brokerage Co., in its answer and statements stated that the shipment was examined on track by General Produce Co., Inc. and the offer submitted to complainant was made by General Produce Co., Inc. with the understanding that General Produce Co., Inc. would take all, or, if the broker sold part to pool, General Produce Co., Inc. would take the balance. The broker gave no confirmation of sale to General Produce Co., Inc. and that company claimed the only offer made by them was at the price quoted, provided the car was billed open, which complainant refused to do.

Ruling included in Decision

1. Complainant failed to establish by competent evidence that a binding contract was entered into with General Produce Co., Inc. and the complaint against that respondent was therefore dismissed. Interstate Brokerage Co. never had the shipment sold to a pool of buyers, and, although it claimed that the original offer submitted to complainant was made and accepted by General Produce Co., Inc. no confirmation of sale was ever issued to General Produce Co., Inc. by the Interstate Brokerage Co.

2. Interstate Brokerage Co. was responsible as agent for an undisclosed principal, or principals, and the record indicated that this respondent misrepresented facts to complainant in that it led complainant to believe that an enforceable contract of sale had been negotiated by it, and an award of reparation would be granted against it except for the fact that complainant released Interstate Brokerage Co. from liability by unconditionally confirming a resale of the shipment, through it to the Southern Ice Co. The complaint as against the Interstate Brokerage Co. was therefore also dismissed.

S-1854, March 22, 1938, Docket 2394: (S.P.)

RIVERSIDE VEGETABLE ASSOCIATION, SACRAMENTO, CALIF. v. WINER & SAROFF COMMISSION CO., KANSAS CITY, MO.

Violation charged: Unjustified rejection of of a carload of lettuce.
Principal points involved: On a charge of unjustified rejection, the seller must prove delivery in accordance with contract terms; buyer's right under purchase "subject buyer's approval of quality on arrival".
Order: Complaint dismissed.

Outline of Facts

On or about May 5, 1936, through a broker, complainant sold to respondent one carload of head lettuce, containing 298 crates, at $1.15 per crate f.o.b. Sacramento, Calif., "sizes mostly 5's, few 4's", or a total purchase price of $342.70. The contract contained no specification with respect to grade or quality but contained the special agreement "Subject buyer's approval of quality on arrival at Kansas City. Subject inspection and acceptance at Kansas City by Winer & Saroff." The lettuce was shipped from California to Kansas City, Mo., where, within 24 hours after receipt of notice of arrival, it was inspected and refused by respondent "because the quality was not good enough for the class of trade we cater to" and it "was irregular in size, but generally big, bulky heads with absolutely no solidity whatsoever; and furthermore the heads were very dirty and the outer leaves of many heads were already slimy." The lettuce was resold for a net amount of $80.29 and complainant made claim for the difference between the purchase price of $342.70 and $80.29, or $262.41.

Ruling included in Decision

The rejection and refusal of respondent to accept the lettuce was not, under the circumstances of this case, arbitrary and without reasonable cause. In deciding this case consideration must be given to the meaning of the special agreement contained in the contract, "Subject buyer's approval of quality on arrival at Kansas City. Subject inspection and acceptance at Kansas City by Winer & Saroff." The court in a previous case which involved a shipment of honeydew melons, with reference to the provision, "subject to buyer's approval of quality on arrival," stated: "I think this is a case where the court would construe this provision to mean that the buyer had the right to exercise his judgment as to whether the commodity fulfilled the contract and that therefore this contract provision with reference to these honeydew melons resolved itself into a question of the right of the defendant to exercise his judgment as to whether he would or would not accept the shipment. Certainly it is a matter dependent on his judgment. Under all these facts and circumstances the judgment must be for the defendant." The court further stated, however, that "this contract does not give defendant the right to refuse the shipment arbitrarily. He cannot say: 'I do not approve them; therefore, I will not take them, whatever the quality.'" The Secretary has held that "an f.o.b. sale subject to acceptance and approval on arrival" amounts to an f.o.b. contract as to price; otherwise, the contract is on a delivered basis. Complainant failed to sustain, by a preponderance of the evidence in this proceeding, the burden of proof that the carload of lettuce tendered to respondent was of the quality which met the approval of the respondent in accordance with the special agreement contained in the Broker's Standard Memorandum of Sale. The complaint was therefore dismissed.

S-1866, March 25, 1938, Docket 2659: (S.P.)

UNITY DISTRIBUTING CO., CHICAGO, ILL. v. SYRACUSE FRUIT CO., INC. SYRACUSE, N.Y.

Violation charged: Unjustified rejection of a carload of onions.

Principal points involved: No contract was consummated since the exchange of telegrams and the conversations merely constituted unaccepted offers of purchase and sale; shipment, without a contract, amounted at most to a new offer; seller's diversion estopped it from later claiming acceptance by respondent.

Order: Complaint dismissed.

Outline of Facts

On June 27, 1936, complainant wired respondent to the effect that complainant could supply respondent with a "car U.S. 1 Wax due tonight $1.05 Chicago." On June 29, respondent wired complainant "**will take car fancy U.S. One Yellows but advise ***lowest delivered price." In a later wire the same day respondent stated that "Fancy U.S. One Yellows" could be purchased "Chicago or nearby diversion $1.10 delivered Syracuse." On the same day complainant wired to the effect that the carload of onions in question had been purchased and forwarded to respondent at a price of $1.05 Chicago. The car arrived at Syracuse July 1, at 10:00 a.m. and respondent was notified of arrival by telephone at 11:00 a.m. Respondent wired that the onions averaged 12% slimy decay and asked for instructions as to what would be done with the car. During the evening of July 1, complainant wired respondent "confirming" a telephone conversation previously concluded in which wire complainant referred to respondent's purchase of the onions on the 29th "at $1.05 track Chicago" and due to respondent's "flat refusal to accept" the load "or furnish us with Government inspection to substantiate your claim" complainant would divert the car to Boston, Mass., and respondent would be held responsible for any loss sustained thereby. Respondent wired complainant its refusal to allow diversion of the car until the onions had been "Federally inspected." Complainant contended that the onions were purchased by respondent on track at Chicago and that respondent's retention of possession of the load at Syracuse was inconsistent with a later refusal to accept, and in fact amounted, as a matter of law, to an acceptance thereof. Complainant made resale and claimed to have been damaged in the sum of $206.99, for which amount reparation was asked.

There being no Federal inspector located at Syracuse, respondent wired the Federal Inspection Service at Buffalo, N. Y., requesting that inspection be made. Such wire was delivered to the Syracuse office of the telegraph company at 10:50 a.m., July 2, and the inspection was completed at Syracuse at 3:00 p.m., July 3. The inspector found that decay ranged from 7 to 26%, averaging 9% for all sacks examined and that the load as a whole then failed to grade U.S. No. 1. Samples for such inspection were taken from the top three layers of the sacks

Ruling included in decision

It was observed from a reading of the wires above referred to that they fell short of a completed contract. Respondent asked complainant to state a price for the onions delivered at Syracuse, whereas complainant made the purchase and forwarded the car as if authority had been received to inspect and buy the load on track at

Chicago. There was nothing in the wires exchanged, or other evidence in the case, that showed a meeting of the minds of the parties concerning the essential details of a completed contract. The parties in said exchange of telegrams together with the telephone conversation failed to agree as to the price, or the place of delivery of said onions, and simply constituted unaccepted offers of purchase and sale. Shipment of the car to Syracuse not being in pursuance of a completed contract, amounted, at most, to a new offer. Respondent had the right to have the grade of the onions officially determined prior to acceptance of the new offer. The evidence showed that an application was made for such inspection within 24 hours after receipt of notice of the arrival of the car. Therefore, even if the tender at Syracuse followed a valid and completed contract of purchase and sale, respondent applied for the inspection in due time. Moreover, complainant's exercise of possession incident to its diversion of the load to Boston estopped it from later claiming a prior acceptance thereof by respondent at Syracuse. The evidence also failed to show that the onions graded U.S.No. 1 either at Chicago on June 29 or at Syracuse, N.Y. on July 3, which was the first time they had been officially inspected. The complaint was therefore dismissed.

S-1867, March 29, 1938, Docket 2779: (S.P.)

STATE DISTRIBUTORS, INC., HAGERSTOWN, MD. v. WINCHESTER WHOLESALE GROCERY CO., WINCHESTER, VA.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: No valid and binding contract is consummated until the parties are in accord as to its terms.
Order: Complaint dismissed.

Outline of Facts

Complainant alleged that on January 27, 1937, it sold to respondent one carload of Maine seed potatoes at $4.65 per sack delivered Winchester, Va. and that the potatoes shipped, which complied in all respects with contract terms, were rejected by respondent, necessitating resale, with a resultant loss of $145.50, representing the difference between the contract price and the amount received from resale, plus accrued demurrage of $8. In the opening statement of facts, complainant spoke of the "initial contract" which referred to the conversation of January 26. On February 5, another telephone conversation was had between the parties. That time it was the complainant's contention that the specifications were changed to 50 sacks of Certified Rose and 225 sacks of Certified Cobblers instead of the "original order" of 275 sacks of Certified Cobblers. Complainant drafted and forwarded to respondent for signature a contract containing these provisions.

There was a controversy as to whether this contract was retained or returned by respondent, but there was no doubt but that it was never signed. Complainant, since it did not receive the signed contract for the second set of specifications, delivered a car containing potatoes of the specifications allegedly agreed upon during the conversation of January 26.

Respondent alleged that while it entered into negotiations concerning the purchase of this shipment, the complainant did not fulfill a material part of the contract and that respondent knew nothing about the particular carload until it arrived at Winchester. Respondent contended that it was the duty of complainant to transmit to the respondent an authentication from the shipper of the particular shipment, which was not done.

Ruling included in Decision

The record clearly showed the confusion resulting from the failure to have contracts in writing. Respondent contended that it was entitled to an authentication and so provided in the negotiations. Complainant denied this statement and contended that it forwarded to respondent a standard confirmation of sale covering the purchase of the potatoes from the shipper by the complainant. Respondent said that it wanted the signature of the shipper before it would consider the contract with the complainant as being completed. While a provision of this kind appeared unusual, the record did support respondent's contention to some extent as the complainant in one of its letters to respondent stated, "As soon as contract is received from shipper, will send it to you." There was little doubt but that something was said during the conversation of January 26 concerning the authentication by the shipper. The record did not show that any contract between the complainant and a shipper was ever sent to respondent. Further, it appeared that the initial contract, if any, was canceled by a second contract calling for different specifications. One of the fundamental rules in the law of contracts is that there must be a meeting of the minds. The record showed beyond a doubt that the parties were never in accord as to the terms of the alleged contract or contracts and no valid and binding agreement was ever consummated. The complaint was therefore dismissed.

S-1868, March 29, 1938, Docket 2475: (S.P.)

SPRINGFIELD FRUIT & PRODUCE CO., INC. SPRINGFIELD, MASS. v. S. GOLDSAMT, INC., NEW YORK, N.Y.

Violation charged: Failure to deliver a carload of tomatoes.
Principal point involved: Since the parties were mutually mistaken with reference to the existence of the subject matter no contract was consummated.
Order: Complaint dismissed.

Outline of Facts

On or about June 11, 1936, complainant bought from respondent, at 90¢ per lug f.o.b. a carload of 675 lugs of U.S. No. 1 Blue Bird brand tomatoes which were described in the contract as being contained in car "IC 655005", and having been shipped from Mississippi on June 9. Respondent thereafter ordered the carrier to divert the shipment contained in the aforesaid car, quoting the number given to the respondent as having been shipped to it on June 9, but diversion was not accomplished since respondent had been given the wrong car number on a shipment contained in car IC 653003, which was thereafter delivered to respondent at New York, N.Y. On failure to receive the shipment contemplated, complainant purchased another carload of tomatoes at a higher price, thereby incurring damages in the alleged sum of $284.51, for recovery of which the complaint in this case was filed.

S. Goldsamt, Inc. filed a complaint against D.C. Simmons, Inc. and Joseph F. Rinn, under the Perishable Agricultural Commodities Act, claiming to have been damaged as the result of these respondents' failure to deliver the shipment of tomatoes in accordance with the terms of a contract previously entered into by these parties. This complaint was dismissed by an order signed on Jan. 19,1938, on the ground that neither of the respondents was found to have violated the act. since there was no evidence presented to show that either of them failed to deliver the tomatoes "without reasonable cause."

Ruling included in Decision

It was clearly evident that S. Goldsamt, Inc. failed to accomplish diversion because of having received the wrong car number from the broker who negotiated the sale to it. It appeared therefore that Goldsamt made diligent effort to divert the carload of tomatoes, which was believed by the parties hereto to be in transit, but since, so far as the record disclosed, no tomatoes had been shipped to respondent in car IC 655005 the parties were clearly mistaken with reference to the existence of the subject matter of the contract. Since the parties were mutually mistaken with reference to the existence of the subject matter, no contract was consummated by them and the complaint was therefore dismissed.

S-1869, March 29, 1938, Docket 2710: (S.P.)

PHIL LESHINE & CO., INC., NEW HAVEN, CONN. v. JACOB WIENER, NEW YORK, N.Y.

Violation charged: Failure to account for a carload of lettuce.
Principal point involved: Implied warranty that the lettuce was fit for resale as food survived acceptance of the car after limited inspection.
Order: Complaint dismissed.

Outline of Facts

On or about May 27, 1937, through a broker, respondent purchased from complainant a carload of lettuce which the broker's memorandum of sale described as 312 crates of "Carnation lettuce." The car was then on track at Jersey City, N.J., having been shipped from Salinas, Calif. on May 11 and arrived at Jersey City that day, and the agreed price was $2.50 per crate delivered. Complainant claimed respondent inspected and accepted the load on track and that there was no warranty of quality or otherwise.

It appeared that the doorway of the car was heavily iced. A witness who unloaded the car on May 28 stated that the door was full of "cake ice" and the top "with snow ice". Respondent contended that on account of the heavily iced doorway of the car, he had no opportunity to fully examine the lettuce until it was unloaded. It was then discovered for the first time that a large part of the lettuce was affected by decay.

The Federal inspector found that the decay ranged from 5 to 20%, averaging approximately 10%, which was mostly in "advanced stage", and affected from one to six leaves, and, also, that from 15 to 20% of the lettuce showed "Tipburn, initial stage". Binney Service inspector also found that an average of 9 to 10% of the heads were affected by decay.

On June 2 and 3, 243 crates of the lettuce were condemned by the New York City Department of Health as unfit for human consumption.

Ruling included in Decision

There was no doubt that respondent purchased the lettuce for resale as food. It followed that in the absence of an express warranty there was an implied warranty that it was fit for that purpose, and such warranty survived acceptance. The facts in this case were distinguished from the facts in two previous cases decided by the Secretary in which the buyers examined samples before purchase and had full opportunity to make further inspection of the loads. Respondent in this case could therefore set up the breach of such implied warranty by way of recoupment in diminution or extinction of the price. At the time of respondent's purchase 243 crates were unmerchantable and unfit for resale as food, which was the purpose for which it was purchased. These 243 crates were therefore without value. Respondent paid $342.63 freight charges on that part of the valueless lot. Complainant's claim of $339.34 was extinguished by respondent's payment of the accumulated freight charges on the entire carload amounting to $440.66, including $342.63 paid as accumulated freight charges on the lettuce that was shortly thereafter condemned. The complaint was therefore dismissed.

S-1871, March 29, 1938, Docket 2262: (Hearing)

UNITED MARKETING EXCHANGE, DELTA, COLO. v. G. ANGELO FRUIT CO., BOSTON, MASS.

Violation charged: Unjustified rejection of seven carloads of peaches.
Principal point involved: Well and fairly well colored peaches did not meet the specification "highly colored", which specification requires higher quality than U.S. No. 1 as to color, etc.
Order: Complaint dismissed.

Outline of Facts

On or about September 13, 1935, through a broker, complainant sold to respondent nine carloads of Elberta peaches at the agreed price of 55¢ per box f.o.b. Colorado loading point. They were warranted to be grade U.S. No. 1, tight pack, brushed, highly colored, and were to be inspected and accepted by respondent, through its agent at Chicago. In other words, the contract called for peaches to meet contract requirements as to quality and condition at Chicago. Nine carloads were thereafter tendered to respondent at Chicago and, acting through its aforesaid agent, respondent accepted and paid for two of them, but rejected the remaining seven, assigning as a reason for such rejection that the peaches were in an overripe, soft, bruised condition and showed insufficient color to conform to the sales specification "highly colored."

Complainant contended that the sale specification simply meant that peaches were to be furnished which were highly colored for grade U.S. No. 1.

The seven carloads were inspected at Colorado loading point. The Federal inspector certified the peaches in two cars as "mostly well colored, many fairly well colored"; in two as "well to fairly well colored, mostly well colored"; in two as "well colored" and in one as "generally fairly well colored." The peaches in three cars were Federally inspected at Chicago. The inspector made findings concerning these loads as follows: "***In most boxes fairly well to well colored, in some boxes generally fairly well colored. ***Generally fairly well to highly colored, approximately half well colored, many fairly well colored, some highly colored. *** Generally fairly well to highly colored, mostly well colored, many highly colored. Some fairly well colored". The City Perishable Inspection Bureau inspector at Chicago certified that the peaches in one car were "generally well colored"; that the color of the peaches in three cars was "generally good"; that in two cars the peaches were "good color" that the color of the peaches in another car was 10 to 75% "reddish blush". Other witnesses testified in general terms as to their inspection of the upper layers in the cars after arrival at Chicago.

Ruling included in Decision

The rejected peaches failed to conform to the complainant's warranty in that they were not "highly colored". The City Perishable Inspection Bureau at Chicago showed that all cars had a certain percentage of peaches ranging from "trifle" to "soft ripe". The negotiations for the purchase of the cars of peaches under consideration originated with a telegram from respondent to its agent at Chicago, Ill., which read as follows: "Quote today's early diversion

fancy hard condition Paonia, Colorado box peaches and sizes. Answer." The contents of this telegram were disclosed to selling agent for complainant, and the complainant's agent therefore knew that respondent was interested in obtaining fancy, hard condition peaches. By accepting the specifications in the memorandum of sale, the respondent, in effect, waived any minor defects of grade that might appear in U.S. No. 1 but continued to require higher quality than U.S. No. 1 as to color, etc. It is a known fact that the color of peaches has an important bearing on their salability and, therefore, the requirement of "highly colored" was a vital provision of this contract. On September 14, respondent's agent wrote to respondent, in part, as follows: "Also confirmation on (one car), which is being rolled to Chicago for our inspection and purchase here. On this latter car the shipper said that he did not personally see this car and did not want to include it in the strict specifications that we have on the other cars. For that reason it is being rolled here for our inspection, and if the fruit is the same as described in the other cars, we will accept it for your account". This indicates that both parties realized they were contracting for peaches above the ordinary standard for grade U.S. No. 1. The inspection certificates, covering inspection at shipping point and at Chicago, submitted by the complainant, failed to show that the peaches were "highly colored", and the inspection certificate covering one car at Chicago, read, in part, as follows: "Defects within tolerance except for excessive ripeness". Respondent's rejection therefore was justified and the complaint was therefore dismissed.

S-1875, March 29, 1938, Docket 2717: (S.P.)

PIOWATY BROS. INC., TEXAS BRANCH, WESLACO, TEXAS v. CRISPO & SONS, NEW YORK, N.Y.

Violation charged: Failure truly and correctly to account for a carload of spinach handled on joint account.

Principal points involved: Federal inspection restricted to 3 stacks of baskets on each side of doorway and 164 baskets on pier insufficient to outweigh Binney and R.P.I.A. inspections; failure of produce to meet grade specification of contract justified failure to account on joint account basis.

Order: Complaint dismissed; respondent awarded $4.75.

Outline of Facts

On or about December 24, 1936, complainant entered into a contract to sell to respondent on joint account one carload of U.S. Grade 1 spinach, containing 862 baskets, at 31¢ per basket, or $267.22. The spinach was shipped on December 24 from Raymondville, Texas and thereafter diverted to New York City. Respondent sold it and submitted to complainant a statement of the account of sales, which, after deducting $35.96 commission and other charges, disclosed a net amount received from the sale of $31.64. Complainant claimed $167.36. From that amount, however, complainant allowed a credit of $36.39 admittedly owing respondent by reason of a deficit on a prior car of spinach, which resulted in the net amount claimed by complainant of $130.97. Respondent claimed, by way of counter claim, $4.75, the difference between the deficit claimed and admittedly due on the prior car of $36.39 and the amount received by respondent from the sale of the instant car of $31.64.

When the spinach arrived in New York City, respondent obtained inspections by the Binney Inspection Service, Inc. and the Railroad Perishable Inspection Agency, whose inspection certificates disclosed that it failed to grade U.S. 1 due to condition. Later an inspection for condition only was made by the inspection service of the Department of Agriculture whose inspection certificate failed to show whether the spinach was or was not grade U.S. 1. Thereafter a further inspection was made by a Federal inspector, whose inspection was restricted to three stacks of baskets on each side of the doorway, and 164 baskets stacked on the Pennsylvania Railroad pier. The inspection certificate issued as the result of this restricted inspection stated that the "stock grades U.S. No. 1."

Rulings included in Decision

1. The record disclosed that the Federal inspection made December 29, at 11 p.m., the certificate of which stated, "stock grades U.S. No. 1", was so restricted and limited in its scope that it failed to overcome the preponderance of the evidence that the spinach failed to grade U.S. No. 1, due to its condition. It was therefore held that the spinach failed to meet the condition of the warranty that it was U.S. Grade 1 and the failure of respondent to account to complainant for the full amount claimed was not, under the circumstances a violation of section 2. The complaint was therefore dismissed.

2. Respondent was awarded $4.75.

S-1877, Jan. 25, 1938, Docket 2913 (S.P.)

RE: APPLICATION OF BEAVER PRODUCE, INC., AKRON, OHIO, FOR A LICENSE UNDER THE P.A.C.A.

Principal point involved: Applicant which took over assets and liabilities of corporation which has violated the act through having failed truly and correctly to account to shippers is not entitled to a license.
Order: Application for license denied.

Outline of Facts

In connection with the application of the Beaver Produce, Inc. for a license under the Perishable Agricultural Commodities Act, a letter was addressed to the applicant by an official of the Bureau stating that issuance of a license to it was being withheld and that if the applicant desired a hearing it should so advise the Bureau. No reply was received. The application showed E.H. Wiener as president of the Beaver Produce Inc. Department records show that he was also president of Wiener-Billman-Roetzel, Inc. which had violated the act by failing truly and correctly to account to three shippers for produce received in interstate commerce. In correspondence with the Department the applicant stated that "we did not form a new corporation, merely amended the charter" and that "the present company has taken over the assets and liabilities of the Wiener, Billman & Roetzel, Inc." and it admitted the indebtedness to two of the shippers. Investigation disclosed that the records of Wiener-Billman-Roetzel, Inc. showed accounts payable to all three of the shippers.

Ruling included in Decision

Wiener-Billman-Roetzel, Inc., whose assets and liabilities have been assumed by Beaver Produce, Inc. has violated the act and therefore the Beaver Produce, Inc. is not entitled to a license under the act in that it failed to account truly and correctly to the shippers. The application for license therefore was denied.

S-1889, April 22, 1938, Docket 2461: (Hearing)

H. D. SOJOURNER & CO., HOPEWELL, MISS. v. J. WIENER, NEW YORK, N.Y.

Violation charged: Unlawful rejection of a carload of tomatoes.
Principal points involved: When broker is dealt with as representative of both parties he has implied authority to do whatever is necessary to carry his authority into effect; duty of seller to see that tomatoes sold rolling are iced; failure to ice tomatoes in transit resulting in decay justified rejection.
Order: Complaint dismissed.

Outline of Fact

On or about June 18, 1936, through a broker, complainants sold to respondent a carload of U.S. No. 1, straight pack tomatoes then in transit, at $1.50 per lug f.o.b. Hopewell, Miss., loading point. The tomatoes had been loaded and shipped from Hopewell on June 17, consigned to complainants, and the bill of lading showed that they were to be carried under "standard ventilation", meaning that the car would not be iced. It was diverted to New York City on June 18, but upon arrival there on June 21 respondent refused to accept.

Respondent contended that complainants' proof failed to establish the existence of a written contract; that the tomatoes having been purchased as a "rolling" load, evidence as to grade at loading point was not sufficient proof as to grade on the day of purchase; and that complainants did not minimize the loss by making prompt resale of the rejected shipment.

The evidence showed that the tomatoes graded U.S. No. 1 at the time of shipment. Inspection was made on June 22 by a Federal inspector who found that approximately 20% of the load was mature green, 35% turning, 25% ripe and firm, and 20% ripe and soft, in many lugs no decay apparent, in most lugs decay ranged from 5 to 12%, averaging 5% for the lot. The inspector certified that the tomatoes then failed to grade U.S. No. 1 "only on account of soft tomatoes in excess of tolerance." The joint inspection certificate of two Federal inspectors, in connection with an appeal inspection made June 23, showed that they found approximately 15% of the stock "mature green, 55 percent turning and 30 percent ripe, including 10 percent soft,

of which 2 percent are soft and bruised, remainder firm; less than 1/2 of 1 percent fresh worm injury. Decay ranges from 1 percent to 25 percent, averaging 8 percent." The inspectors certified that the stock then failed to grade U.S. No. 1 "only on account of decay and soft tomatoes in excess of the respective tolerances."

Rulings included in Decision

1. It was true that the contract of sale in this case was not a single written contract that was executed by buyer and seller, but it was a contract made up of written telegrams exchanged between complainants and the broker, and was followed by the issuance of the broker's memorandum of sale. In prior cases, attention has been called to the rule stated in Mecham on Agency to the effect that at the outset a broker may only be the agent of one party to the contract, but when a broker is dealt with as the representative of both parties he has implied authority to do whatever is necessary to carry his authority into effect, such as the signing of a memornadum of sale. The evidence showed that respondent made the purchase acting through the broker as his agent although prior to purchase the broker was only the agent of complainant.

2. Rolling carloads of perishable commodities are not ordinarily stopped en route for inspection at the time of purchase. It seemed clear respondent understood he was purchasing a rolling load that at the time of shipment graded U.S. No. 1.

3. It was considered that resale of the load was concluded without undue delay. The load was inspected on June 22, and reinspection was made June 23. The broker wired complainants as to respondent's positive rejection June 24. Complainants wired the broker June 24 to sell the rejected shipment for respondent's account. Resale was made the 25th, and account sales was rendered on the 26th.

4. Respondent's refusal to accept at destination did not amount to a rejection without reasonable cause. The record showed that New York City is known as a fifth morning delivery point on shipments from Hopewell, Miss.; that it is usual to order ice in transit, when the routing of a car requires more than three days in transit; that other loads shipped by complainants to fifth morning delivery points on June 17 to 19, inclusive, were initially iced. The maximum temperatures in parts of Mississippi and Tennessee on June 18 and 19 ranged from 92° to 100° F., and this car moved to New York City without being iced. While the purchase price agreed upon was f.o.b. loading point, the car was consigned by complainants to themselves. Complainants instructed the carrier to

divert the car to themselves, "advise J. Wiener" and allow inspection. Complainants obviously retained control of the load to enforce payment of the purchase price. The evidence clearly indicated that the complainants knew it would be necessary to ice the car in transit. It was not enough to say that because the purchase was made on an f.o.b. basis complainants' duty to keep the load in condition ceased after respondent's purchase thereof in transit. It was considered that a duty rested on complainants to see that the shipment was iced or to show that respondent accepted responsibility for icing it. The evidence indicated that if that had been done, soft stock and decay would probably not have developed in transit to the extent shown by the Federal destination certificate. The complaint was therefore dismissed.

S-1892, May 31, 1938, Docket 2700: (S.P.)

FRUIT SALES, INC., WENATCHEE, WASHINGTON v. BELLER FRUIT CO., MINNEAPOLIS, MINN.

Violation charged: Unjustified rejection of a car of apples

Principal point involved: Apples which were 22% "C" grade did not meet contract specification "not to exceed 15% 'C' grade", hence rejection was not without reasonable cause.

Order: Complaint dismissed.

Outline of Facts

On or about Sept. 29, 1936, through a broker, complainant sold to respondent a carload of Orchard Run Face and Fill Jonathan apples of sizes 2½ inches and larger, not to exceed 15% "C" grade, at the agreed price of 85¢ per box f.o.b. shipping point, or a total sale price of $642.60. The apples were shipped from Soap Lake, Washington, to respondent at Minneapolis, Minn., where they were rejected by respondent, who claimed that they were under the size required and were generally unattractive fruit. Complainant made resale for the net sum of $445.25 and asked for damages of $172.35, the difference between the amount realized from the resale and the contract price, less $25 brokerage.

Federal-State shipping point inspection certificate showed the size as "Generally 2¼ to 3½, mostly 2½ to 3 inches in diameter" and as to quality, "Approximately 36% of stock meets requirements of Extra Fancy, 42% Fancy, Defects of C Grade within tolerances. Remainder C Grade", and grade "Washington Orchard Run." State inspection at destination showed size "Ranging 2 1/8 to 3 inches, mostly 2 1/4 inches and larger. In most samples none, in many samples from 10 to 25% under 2 1/4 inches in diameter," and "Grade defects within the tolerances for Washington Orchard Run grade." Under "Remarks" the certificate stated "Inspection and certificate restricted to the accessible portion of the load consisting of stock in upper 3 layer boxes in 3 stacks next to center bracing. Truck used to make inspection."

Ruling included in Decision

Complainant failed to establish that it offered for delivery apples which met contract requirements and respondent's rejection was not without reasonable cause. The shipping point inspection showed that approximately 36% of the stock met the requirements of Extra Fancy, 42% Fancy, defects of "C" grade within tolerances, remainder "C" grade. Thus, at least 22% of the apples were "C" grade, whereas the contract called for not more than 15% "C" grade. The complaint was therefore dismissed.

S-1894, May 31, 1938, Docket 2734: . (S.P.)

LEWIS YODER CO., NAMPA, IDAHO v. MIDWEST FRUIT CO., OMAHA, NEBR.

Violation charged: Failure to return an allowance on a carload of apples.
Principal points involved: Testimony given under oath is entitled to greater weight than unverified copies of telegrams alleged to have been received.
Order: Complaint dismissed.

Outline of Facts

On or about October 13, 1936, through a broker, complainant sold to respondent one carload of Idaho Hail grade Jonathan apples at $1 per basket f.o.b. shipping point, Sonna, Idaho, or a total of $660 for the carload. Complainant thereafter diverted the apples to respondent at Omaha, Nebraska. Upon arrival at destination respondent requested an complainant granted an allowance of 5¢ per basket, or a total of $33. Complainant claimed that the allowance was granted after respondent reported inspection of the apples showed 15% decay and under an agreement that respondent would submit a Federal inspection certificate showing that amount of decay in some baskets, but that respondent failed to submit such certificate. Respondent denied that it agreed to submit such certificate.

Ruling included in Decision

The person seeking to change existing legal relationships has the burden of proving facts in support of his contention by preponderance of the evidence. The record showed complainant wholly failed so to maintain the burden of proving his contentions. The principal issue in this case relates to a conversation between the broker and the respondent. In support of the complainant's contentions the record disclosed only the unverified copies of certain telegrams sent by the broker to the complainant. The facts purported to be asserted therein have been specifically attacked by the respondent as self-serving declarations. In the face of this attack the complainant failed to support the statements contained in the telegrams by the oath of the broker who allegedly sent the telegrams. Against these statements contained in the telegrams were those of respondent made under oath. The testimony of the respondent given under oath was entitled to greater weight than the unverified copies of the telegrams alleged to have been received and clearly overcame and rebutted any presumption that might arise out of the copies of the telegrams. The complaint was therefore dismissed.

S-1904, June 8, 1938, Docket 2899: (Hearing)

NATALE & FRANK, INC., NEW YORK, N.Y. v. RILEY-McFARLAND CO., CHICAGO, ILL.

Violation charged: False and misleading statements in connection with the inspection and purchase by respondents of a carload of tomatoes.

Principal points involved: Evidence that tomatoes were 55% ripe upon arrival at New York is not conclusive showing that tomatoes were more than 15% turning red at Chicago when purchased; on above evidence respondents could not be held guilty of negligent or fraudulent conduct.

Order: Complaint dismissed.

Outline of Facts

On or about Oct. 5, 1937, complainant's broker engaged the services of respondents to inspect and purchase a carload of tomatoes, to be 85% green and to consist largely of size 6x6, at the price of $1.50 per lug delivered at New York City. Respondents thereafter inspected 600 lugs which had been shipped from California to Chicago, Illinois and purchased them at the stipulated price. Upon arrival of the tomatoes at New York complainant inspected and paid the contract price to the seller but in its complaint contended that respondent made the purchase for it in such a negligent manner as to be liable for the loss sustained by the complainant, in that Federal inspection at New York showed 55% to be ripe and firm and 30% ripe and soft, which complainant contended indicated that the shipment must have been more than 15% ripe at Chicago at the time of purchase by respondents. Complainant therefore sought reimbursement from respondents in the amount of loss sustained, $532.70, representing the contract price of $507.34 plus freight of $392.66, cartage to complainant's store of $38.86, and sorting and inspection charge of $8.19, less $414.35 received from resale.

Federal inspection for condition, on October 9, at New York showed: "Of stock free from decay approximately 5% mature green, 10% turning, 55% ripe and firm, 30% ripe and soft, 3% worm injury, live worms present. In most samples no decay apparent. In some 4% to 8%, averaging 2% Phoma Rot and Rhizopus Soft Rot, mostly initial stage, 20% of stock shows streak, mostly slight." Apparently this was the only official inspection made of the shipment after it left California on Sept. 24, when it graded 85% U.S.No. 1 and was certified to be mature green, as evidenced by a certificate of Federal inspection contained in the record.

One of the partners of respondent firm testified at the hearing that he made the usual inspection of the tomatoes, which consisted of "a doorway, top load inspection" and found "a good car of tomatoes, well packed, crown fruit. Well,-with approximately 10% to 15% color, by color I mean, turning a red," but there was no definite showing that this inspection was made on the day the purchase was made for complainant. An employee of the seller testified that he inspected the shipment at Chicago and stated, "my inspection is car-door and both ends of the car and in the end of the car you couldn't find any, but turning, occasionally a tomatoe just turning," but he testified that this condition prevailed two days before the purchase was made by respondents for complainant, when this witness last saw the tomatoes.

Ruling included in Decision

Complainant relied upon respondents' judgment to inspect and purchase a carload of tomatoes of certain sizes and to be 85% green. In the absence of inspection at Chicago by an impartial party, the complainant relied for proof of its claim largely upon the Federal inspection at New York, which showed that the tomatoes were about 55% ripe and firm and 30% ripe and soft at the time of arrival at that point, and therefore concluded that the tomatoes must have been more than 15% ripe at Chicago at the time of purchase by respondents. It was very doubtful if such evidence was sufficient to show conclusively that the tomatoes were more than 15% ripe when purchased by respondents at Chicago, but even if it were conceded that respondents failed to purchase tomatoes of the desired ripeness as instructed by complainant there still remained the question of fraudulent intent on the part of respondents. There might be some doubt that inspection was made immediately before the purchase, but there was no showing that the usual doorway inspection would have revealed more than 15% of the shipment to be turning red under the most careful inspection, and hence there was no showing of fraudulent intent on the part of respondents. No reason could therefore be found for holding that the respondents were guilty of negligent or fraudulent conduct and the complaint was dismissed.

S-1905, June 8, 1938, Docket 2567: (Hearing)

UNITED BROKERS CO., PORTLAND, OREGON v. S. & H. LEVY CO., CHICAGO, ILLINOIS.

Violation charged: Unjustified rejection of a carload of squash.
Principal point involved: Failure of seller to prove shipment of cured squash, as specified in the contract, caused dismissal of the complaint.
Order: Complaint dismissed.

Outline of Facts

On or about December 23, 1935, through a broker, complainant sold to respondent a carload of cured Marblehead squash for shipment on or about January 1, 1936, at $30 per ton f.o.b. Complainant, within the prescribed time, shipped a carload of 20,615 lbs. of bulk Marblehead squash from Sunnyside, Washington, to respondent at Chicago, Ill., where it arrived January 6, and was promptly rejected by respondent. Complainant made resale for $283.65, which failed to equal freight and other charges by $217.51, and asked for an award of this deficit plus the contract price of $309.23, or a total of $526.74.

Respondent contended that the original invoice for the squash showed part of it as uncured and that the Federal inspection certificate issued at Chicago showed a condition which would not have existed had the squash been cured.

Ruling included in Decision

1. Complainant failed to submit any evidence to show that the squash was cured. The shipping point inspection certificate supported complainant's contention that Marblehead squash was shipped, but was silent with reference to whether the squash was cured. The certificate of Federal inspection made at Chicago, Illinois on January 9, or approximately eight days after shipment was made, showed that the squash averaged "approximately 15% decay generally occurring in the form of few to many small spots. Decay is various fungi rots." This, together with the fact that that the shipment was resold for considerably less than the transportation and other charges, indicated conclusively that the squash was in exceedingly poor condition at the time of arrival at Chicago, or soon thereafter. It was not necessary to pass upon the validity of respondent's contentions because of complainant's failure to sustain the burden of proof and the complaint was dismissed.

S-1915, June 16, 1938, Docket 2465: (S.P.)

BEN E. KEITH CO., FORT WORTH, TEXAS v. ANGELES BROKERAGE CO., LOS ANGELES, CALIF.

Violation charged: Failure to deliver a carload of lemons in accordance with contract.

Principal points involved: Failure to deliver without reasonable cause makes seller liable for damages; effort to make delivery no defense; measure of damages same whether breach caused by mistake, accident, inability to perform, wilful or malicious.

Order: Complainant awarded $291.40 plus interest.

Outline of Facts

On August 10, 1937 the broker wired respondent: SOLD *** BEN KEITH HERE $4.25 FOB SUBJECT INSPECTION ARRIVAL CONFIRM. Respondent immediately replied: CONFIRM KEITH HAVE CASH OFFER SAME PRICE NOW BILLED NOTIFY WEST TEXAS PRODUCE INSPECT REPORT QUICKLY ARRANGE AIRMAIL CHECK IMMEDIATELY ACCEPTED***. Thereafter the broker issued a standard memorandum of sale specifying the sale to complainant for the account of respondent of one carload, 348 boxes, Extra Choice lemons at the f.o.b. price of $4.25 per box. The shipment arrived at Forth Worth, Texas, Saturday, August 10. The broker, in a letter to respondent dated August 14, stated that it was advised by the railroad at Fort Worth at 2:30 p.m. Sunday, August 11, that the West Texas Produce Co. claimed the right to unload the lemons but that the carrier's agent was advised of the sale to complainant to whom delivery should be made. However, the broker failed to notify respondent of this until after respondent wired on August 12: RAILROAD REPORTS TWO FIRMS TRYING UNLOAD STOP SOLD KEITH AWAITING ACCEPTANCE BEFORE RELEASING ***. The broker replied: KEITH ACCEPTS *** WIRE TEXAS & PACIFIC RAILROAD RELEASE KEITH QUICK. Respondent's reply authorized the release of the car and the broker then advised: UNABLE RELEASE CAR *** TO KEITH AS TEXAS AND PACIFIC RAILROAD ALREADY RELEASED TO WEST TEXAS PRODUCE THEY HAVE UNLOADED ***. Complainant alleged that it was damaged in the sum of $390.40, the difference of $260.40 between the cost of 348 boxes of lemons which respondent failed to deliver and the price paid by complainant for replacement of an equal number of boxes, and the alleged loss of profits of $130 on 100 boxes claimed to have been sold to a firm at Dallas, Texas, to whom delivery could not be made.

Ruling included in Decision

The exchange of communications between respondent and the broker, quoted in the decision, indicated that a contract was entered into in interstate commerce by and between the parties hereto for the sale of the lemons at the f.o.b. price of $4.25 per box or for the net sum of $1479 for the carload if the shipment was found satisfactory by the complainant who had the right under the agreement to inspect the shipment, which was then in transit in interstate commerce, when it arrived at destination before finally accepting it. Respondent's failure to make the shipment available to complainant without a showing of a reasonable cause for so doing was considered a breach of the contract to deliver such as rendered respondent liable for damages. Respondent's contention that it made every effort to deliver the shipment to complainant was no defense. In 8 R.C.L. 423, numerous cases are cited and the following statement made: "But as a rule the measure

of damages is the same whether the breach be by mistake, accident, or inability to perform, or whether it be willful and malicious." Since no proof whatever was found in the record supporting complainant's claim that 100 boxes had been sold to the Dallas firm at a price which would result in the profit claimed, or that delivery could not have been made from the replacement purchase, no consideration was given to the alleged loss of profit. However, on August 13, complainant did purchase a replacement carload of 348 boxes from a Fort Worth firm at the delivered price of $2188, or the equivalent of an f.o.b. California price of $1770.40, which was $291.40 more than complainant contracted to pay respondent for the lemons. Complainant was therefore awarded $291.40 plus interest.

S-1916, June 16, 1938, Docket 2732: (Hearing)

HALF MOON FRUIT & PRODUCE CO., INC., SAN FRANCISCO, CALIF. v. M. J. HALL, NOGALES, ARIZONA.

Violation charged: Failure to deliver in accordance with contract two carloads of peppers.

Principal points involved: Purchases in small quantities are not fair comparison of prices for establishing damages as result of replacement purchases; buyer estopped to complain when failure to deliver caused by its delay; buyer's failure to accept shipments extended time for delivery a "reasonable time"; when car diverted by seller at buyer's request seller is under obligation to notify buyer he intends to hold buyer liable for damages.

Order: Complainant awarded $300; respondent's counterclaim dismissed.

Outline of Facts

Following an exchange of telegrams, complainant and broker, on December 16, 1936, entered into an agreement over the telephone for the purchase and sale of five carloads of 85% U.S. No. 1 Mexican peppers, to be shipped from Mexico to California. On the same day respondent confirmed the sale by letter to the broker saying "We hereby confirm the sale of five cars of peppers at $1 f.o.b. net to us, shipment dates to be decided after December 25," complainant to advance $150 per car to be paid on or before December 19. Complainant issued a check for $750, bearing on its face a notation reading "5 cars California Wonder Peppers 85% U.S. No. 1, minimum 45# or better," which check was received and cashed by respondent.

During January and February, when the broker wired complainant insisting upon shipments being made, stating that frost damage was likely to cause a shortage of available shipments, complainant replied that the market was dull and no more shipments could be used. However complainant did accept three cars, offered on January 4, January 17 and February 16 and refused those offered on January 14, January 28, and March 2. In March complainant began insisting on shipments being made but was advised by the broker that this was practically impossible. On seven different dates between and including March 30 and May 12, complainant bought peppers to fill its requirements on account of failure to receive the last two cars on the contract, consisting of 10 lots ranging from 25 to 265 crates each, aggregating 890, the weights ranging from 34.10 to 44 lbs. per crate. Damages were claimed in the sum of $2344.73 but at the hearing this amount was reduced to $2167.58, including the $300 deposit.

Respondent claimed that on or about December 24 or 26 the shipping dates were fixed as January 4, January 14, January 24, February 4 and February 14, and filed a countercomplaint seeking to collect damages of $650.58 because of complainant's unjustified rejection of the last two cars due under the contract. Complainant claimed no dates of shipment were fixed.

Rulings included in Decision

1. The preponderance of the evidence showed that the broker mentioned above acted as agent for complainant and not for both parties. Respondent testified that this broker never acted as his agent or broker. The broker testified that he represented the complainant from whom he received a commission of 10¢ per crate, or $45 a car, and that he received no commission from respondent. Complainant's agent accepted the first five cars from respondent for delivery under the contract.

2. Complainant's contract with respondent was for carlots of 450 crates each, whereas, in making replacement purchases, complainant bought in lots averaging less than one-fifth of a carload. Obviously, purchases in small quantities are not a fair comparison of prices for establishing damages as the result of replacement purchases. While complainant on March 29, 1937 made demand on respondent to deliver the two remaining cars, on April 17 complainant was still letting him understand it was desiring delivery, failing which it would "protect its interests", and on April 19 the complainant wired, " We still have due two cars peppers." Nevertheless as seen above, the complainant had been buying replacement peppers since March 30.

3. As early as January 14, 1937, the broker wired complainant in part, "Hall will divert your Saturday car east but will give you car Monday and wont take no for an answer because your first contract car left here fourth", which would indicate that some shipping dates had been decided upon, and on April 18, 1937, the respondent wired complainant asserting that the dates of shipment were agreed to be ten days apart which the complainant denied in its telegram of the same date. Since peppers are a seasonal crop, it was unreasonable to assume that the parties did not contract in contemplation of this fact. Complainant stated that its failure to accept cars offered "automatically extended delivery time" from which it must be at least inferred that some time of delivery had been decided upon, otherwise there could not be an extension of delivery time. Time was necessarily of the essence of this contract, peppers being a seasonal crop. Complainant's failure to take the cars offered on January 14 and January 28 (after shipping dates had been agreed upon) extended the time for delivery of the two remaining cars a "reasonable time", and the freeze and the end of the season for good peppers intervened before respondent could perform, for which complainant, by its delay, was estopped to complain. Since complainant failed to make out its case by sustaining the burden of proof, its complaint was dismissed except as to the advance of $150 on each of the two cars, which respondent at all times was willing to refund to complainant. The award to complainant was therefore for $300.

4. Respondent's countercomplaint was also dismissed because of his failure to advise complainant definitely that he was going to hold complainant to take the cars under the contract and because the peppers contained in the car offered March 2 did not meet the terms of the contract in that they were 70% U.S. No. 1 and not 85% U.S. No. 1 quality. Furthermore, in accordance with complainant's theory of the contract, that the dates for shipment were never set, there was obviously no breach of contract by the complainant in not taking the cars offered on January 28 and March 2. On the respondent's theory that the dates were set at ten day intervals after January 4, respondent by his line of conduct, as in diverting car offered January 14 at the request of complainant, certainly was under obligation to inform the complainant that he was going to hold complainant to accept the car offered January 28 before selling it for complainant's account. The car offered March 2, as previously stated, failed to comply with the contract and therefore required no further consideration.

S-1918, June 16, 1938, Docket 2445: (Hearing)

M. CORNFIELD & CO., ST. LOUIS, MO. v. CREWS FRUIT CO., DENVER, COLO.

Violation charged: Unjustified rejection of a carload of apples.
Principal points involved: Acceptance must agree with offer; before unauthorized act of broker can be ratified, his principal must have knowledge of act; to constitute ratification the affirmance must be before the agreement is terminated.
Order: Complaint dismissed.

Outline of Facts

The record showed that the transaction was negotiated through a broker by an exchange of telegrams, the pertinent portions of which were as follows:

(Exhibit No. 4) IMMEDIATE SHIPMENT CREWS FRUIT GOOD CAR RING FACED JONATHANS COMBINATION EXTRA FANCY AND FANCY TWO AND QUARTER INCH AND LARGER GOOD COLOR SUBJECT TO INSPECTION DENVER EIGHTY CENTS FOB CONFIRM (signed by broker)

(Exhibit No. 5) DUE DENVER TOMORROW MORNING HAVE CREWS INSPECT EIGHTY FIVE CENTS OR WILL CONFIRM TOMORROWS SHIPMENT RINGFACED JONATHANS COMBINATION EXTRA FANCY AND FANCY JONATHANS TWO AND QUARTER INCHES AND LARGER EIGHTY CENTS (signed M. Cornfield & Co.)

(Exhibit No. 6) CREWS WILL TAKE TOMORROWS CAR JONATHANS EIGHTY CENTS FOB SUBJECT INSPECTION AND ACCEPTANCE DENVER TRY HARD CONFIRM THIS BASIS (from broker)

(Exhibit No. 7) CONFIRM CREWS IDAHO JONATHANS COMBINATION EXTRA FANCY AND FANCY GRADE TOMORROWS SHIPMENT EIGHTY CENTS (signed M. Cornfield & Co.)

Complainant claimed the sale covered one carload of Idaho Jonathan apples "Combination Extra Fancy and Fancy" grade at 80¢ per bu. f.o.b. Idaho, or a total contract price of $528; and that because of respondent's unjustified rejection complainant was compelled to sell elsewhere for $32.50 less than handling and transportation charges, resulting in a loss to complainant of $560.55.

Respondent asked for dismissal on the ground that there was no contract between the parties.

Ruling included in Decision

Exhibit No. 4 showed that respondent offered to purchase "subject to inspection Denver." Exhibit No. 5, in answer to exhibit No. 4, failed to mention anything about "inspection Denver." Exhibit No. 6 reiterated respondent's offer "subject to inspection Denver," with the additional request, "try hard to confirm this basis." Exhibit No. 7, in answer to Exhibit No. 6, again failed to mention anything about "subject to inspection Denver", even though respondent expressly requested confirmation on that basis. Exhibit No. 7 was in substance a reiteration of complainant's offer appearing in Exhibit No. 5 and did not comply with the terms of respondent's offer appearing in Exhibit No. 6. In order to give rise to a contractual relationship it is necessary that the proposed acceptance comply with the requirements of the offer omitting nothing from the terms requested. Exhibit No. 5, in response to respondent's offer appearing in Exhibit No. 4 contained two separate offers. One offer pertained to a car "DUE DENVER TOMORROW", and the other was an offer for "TOMORROWS SHIPMENT." Respondent, as evidenced by Exhibit No. 6, offered to take "TOMORROW'S CAR". The complainant, in response thereto, by Exhibit No. 7, confirmed "TOMORROWS SHIPMENT". These telegrams, when interpreted in the light of the testimony of the complainant, and all of the other surrounding circumstances, clearly showed that there was no meeting of minds sufficient to give rise to a valid and enforceable contract. The record clearly disclosed that the broker, in preparing the memorandum of sale, was not authorized to include the phrase "subject to inspection and acceptance on arrival at Denver." It did not appear from the record that respondent ever received a copy of this memorandum. Complainant, by his own testimony, showed that he did not receive a copy of it until after the apples had been rejected. It is well settled that before an unauthorized act of a broker can become effective and binding upon his principal, the principal must have knowledge of the unauthorized act and signify his assent thereto. Complainant in this instance could not have ratified the unauthorized action of the broker because the apples had been rejected by respondent before complainant had received a copy of the memorandum of sale. In order to constitute ratification, the affirmance of a transaction must be before the offer or agreement has terminated. Respondent, having rejected the goods prior to the receipt of the broker's memorandum of sale by the complainant, had terminated the transaction. Therefore, no enforceable agreement was created.

S-1922, June 21, 1938, Docket 2641: (Hearing)

CALIFORNIA FRUIT EXCHANGE, SACRAMENTO, CALIF. v. J.L. WALKER, NORFOLK, VA.

Violation charged: Unjustified rejection of three carloads of grapes.
Principal points involved: Complaint dismissed on request of complainant.
Order: Complaint dismissed.

Outline of Facts

Complainant sought to recover a loss claimed to have been sustained on the resale of three interstate carload shipments of Emperor grapes rejected without reasonable cause by respondent. Respondent contended that his rejection was warranted since the grapes were not in such condition that they could be held in cold storage.

A Hearing was held in Norfolk, Va., on December 7,1937, and on March 28, 1938, after receipt of a copy of the transcript of the hearing, complainant wrote a letter to the Department of Agriculture stating that the testimony of one of the witnesses "was wholly contrary to our understanding of the facts, and discloses that he never revealed the same to us." Complainant then stated that, in view of this fact, it did not desire to proceed further with the action and wished the case dismissed.

Ruling included in Decision

The complaint was dismissed.

S-1927, July 2, 1938, Docket 2463: (Hearing)

ALTMAN & SWARTZ, BUFFALO, N.Y. v. WOLF & COHEN, PHILADELPHIA, PA.

Violation charged: Unjustified rejection of two carloads of lettuce.
Principal points involved: In absence of meeting of minds of the parties as to essential specifications of the contract, the buyer's wire requesting seller to cancel, amounted to a withdrawal of the offer to purchase.
Order: Complaint dismissed.

Outline of Facts

After a telephone conversation between the parties concerning the purchase and sale of two carloads of lettuce, respondents wired complainants and, referring to the telephone conversation, stated: OKAY DIVERT TO OURSELVES AT PHILADELPHIA VIA PENNSYLVANIA RAILROAD DELIVERY BASIS $3.50 DELIVERED *** AMERICAN BEAUTY BRAND LETTUCE AND *** CARNATION BRAND LETTUCE BOTH SHIPPED THE SEVENTH. This wire was received by the telegraph company at Buffalo, N.Y., on April 13, 1936 at 10:28 a.m. and at 12:50 p.m. the same day complainants wired respondents: CONFIRMING DIVERTING TRANSIT ACCEPTANCE. At 1:15 p.m. respondents wired complainants: SORRY SINCE DID NOT HEAR FROM YOU ALREADY BOUGHT ELSEWHERE CANCEL.

Ruling included in Decision

Respondents offered to purchase the two carloads in question at a Philadelphia delivered price of $3.50 per crate. Complainants contended that in the prior telephone conversation "transit acceptance" was specified, and that when respondents wired complainants "referring to our telephone conversation okay divert to ourselves -- basis $3.50 delivered," a valid and binding contract was completed. Respondents denied having agreed to buy the two cars at a price, delivered Philadelphia, rolling acceptance. Therefore, complainants' confirmation was coupled with a new condition, to wit: "transit acceptance," and respondents thereafter withdrew their offer. Transit acceptance, or "rolling acceptance," means that the "buyer assumes full responsibility for transportation of the goods from time of purchase." Complainants' confirmation was not an unqualified acceptance of respondents' offer and no contract of purchase and sale resulted from such exchange of wires. Under these circumstances respondents' cancellation wire amounted to a withdrawal of the offer to purchase. The complaint was therefore dismissed.